80-255

No. 80-.....

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1980

GEORGIA POWER COMPANY,
Petitioner,

vs.

138.30 ACRES OF LAND and MILDRED B. SANDERS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the just compensation clause of the fifth amendment, rather than the law of the forum state, governs the measure of compensation in condemnation proceedings brought in a federal district court under the right of eminent domain delegated to federal licensees by Section 21 of the Federal Power Act.

PARTIES

The parties to this proceeding in the court of appeals were as follows:

Georgia Power Company;

138.30 Acres of Land in Land Lot 327 of the Third Land District, 389th GM District, Putnam County, Georgia;

Mildred B. Sanders, a/k/a Mrs. Carl D. Sanders, Jr.;

Brannen McCarthy Sanders;

Carl Walton Sanders;

377.61 Acres of Land in Land Lots 367, 368, 369, 377, 378, 379, 380, 381, 382 and 383 of the Third Land District, 389th GM District, Putnam County, Georgia;

Nellie W. Larman;

532.82 Acres of Land in the 145th GM District, Green County, Georgia;

Clifford H. Dyer, Jr.;

J. P. Dyer III; and

George M. Dyer.

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No. 80-.....

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GEORGIA POWER COMPANY,
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vs.

138.30 ACRES OF LAND and MILDRED B. SANDERS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Georgia Power Company respectfully petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in the above-entitled case.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals (App. A1) is reported at 617 F.2d 1112 (5 Cir. 1980). The panel opinion of the Court of Appeals (App. A36), is reported at 596 F.2d 644 (5 Cir. 1979). The prior opinion of the Court of Appeals (App. A53) which was overruled by the *en banc* decision is reported at 563 F.2d 1178 (5 Cir. 1977). Copies of the judgments sought to be reviewed are reproduced in the Appendix at A99, A101 and A103. The judgments sought to be reviewed involve identical questions, and Georgia Power Company is, therefore, filing a single petition pursuant to Rule 19.4.

JURISDICTION

The judgments of the court of appeals were entered on May 27, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const. amend. V:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 21 of the Federal Power Act, ch. 285, 41 Stat. 1074, 16 U.S.C. §814, provides:

That when any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which, in the judgment of the Commission, is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interestate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the District Court of the United States for the district in which such land or other property may be located, or in the state courts. The practice and procedure in any action or proceedings for that purpose in the District Court of the United States shall conform as nearly as may be with the practice and procedure in similar

action or proceeding in the courts of the state where the property is situated: *Provided,* that the United States District Courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.00.

STATEMENT OF THE CASE

These are land condemnation cases brought by Georgia Power Company in connection with its Lake Wallace Project, 42 F.P.C. 356 (1969). The jurisdiction of the District Court was invoked under 16 U.S.C. §814.

In a prior decision also involving petitioner's Lake Wallace project, *Georgia Power Company v. 54.20 Acres of Land, et al.,* 563 F.2d 1178 (5 Cir. 1977), the court of appeals held that just compensation in a condemnation case instituted by a Federal Power Commission licensee under §21 of the Federal Power Act is to be determined in accordance with rules developed in federal condemnation decisions. It rejected contentions of the landowners that state law controlled or supplied the rules of decision to determine just compensation. The landowners filed a petition for writ of certiorari to this Court. The Court invited the Solicitor General to file a brief setting forth the views of the United States, 439 U.S. 814 (1978), and thereafter denied certiorari, *Boswell v. Georgia Power Company,* 440 U.S. 907 (1979).

In the meantime, the instant cases were proceeding through the district court and were thereafter appealed to the court of appeals. A panel of the Fifth Circuit held that it was bound by the earlier decision approving the use of federal rules to determine just compensation. *Georgia Power Company v. 138.30 Acres of Land, et al.,*

596 F.2d 644 (5 Cir. 1979). A motion for rehearing *en banc* was granted, and the panel opinion was reversed. *Georgia Power Company v. Sanders,* 617 F.2d 1112 (5 Cir. 1980).

The Court of Appeals held that the source of the eminent domain power in question is federal, but that "[s]ince the statute does not specify the appropriate rule of decision, the task of interstitial federal lawmaking falls upon the federal judiciary in this case 'to declare the governing law in an area comprising issues substantially related to an established program of government operation.'" *Id.* at 1115. It reviewed a series of decisions from this Court beginning with *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1964) through *United States v. Kimbell Foods, Inc.,* 440 U.S. 715 (1979) and determined that "state law should be adopted unless it is shown that the legislative intent or other sufficient reasons exist to displace state law with federal common law. . . ." *Id.*

It concluded that the "interests of the United States in the determination of the amount of compensation a private licensee must pay a landowner in a condemnation proceeding under §21 are not sufficient to warrant displacement of state law on that issue." *Id.* at 1118, and that "the law of the state where the condemned property is located is to be adopted as the appropriate federal rule for determining the measure of compensation when a licensee exercises the power of eminent domain pursuant to §21 of the Federal Power Act." *Id.* at 1124.

Four judges dissented on the ground that federal rules should apply of their own force to such condemnation proceedings for the reasons set forth in the first opinion of the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Incorrectly Decided an Important Question Concerning the Interpretation of the Fifth Amendment Which Should Be Settled by This Court.

The court of apppeals committed fundamental error when it treated the issue before it as one of interstitial lawmaking. Rather, the issue involves the interpretation of the just compensation clause of the fifth amendment which is solely and exclusively a question of federal constitutional law. There is no occasion to undertake any balancing of interests between the federal government and the states or to search for the intention of Congress as to how to calculate the amount of money which must be paid to a landowner to comply with the constitutional mandate.

Section 21 of the Federal Power Act delegates to licensees the use of the *federal* power of eminent domain. This is the exact same power which is available to the federal government, its agencies and officials, and is the only power which Congress can delegate. *Kohl v. United States*, 91 U.S. 367 (1876). When Congress delegated this "right of eminent domain" to FPC licensees it did not leave any gap in the statute which needs filling any more than it did when it delegated the use of the power to, for example, the Secretary of the Army,[1] the Secretary of the Interior,[2] the Tennessee Valley Authority,[3] or a natural gas pipeline company.[4] It was not setting

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1. 33 U.S.C. §591.
2. 43 U.S.C. §421.
3. 16 U.S.C. §831x.
4. 15 U.S.C. §717.

up a new scheme or program with new rights and duties and the almost invariable gaps or interstices which accompany such legislation. Rather, it was delegating a pre-existing power whose constitutional limitations were well-known to Congress by 1920.[5]

Prior decisions of this Court have undertaken to formulate "working rules" to control the admissibility of evidence in the determination of just compensation. *See, e.g., Bauman v. Ross,* 167 U.S. 548 (1897) (off-setting benefits); *Olsen v. United States,* 292 U.S. 246 (1934) (highest and best use in combination with other lands); *United States v. Miller,* 317 U.S. 369 (1943) (elimination of enhancement); *United States v. Fuller,* 409 U.S. 488 (1973) (elimination of value based on use in combination with government permit lands). However, rather than viewing its task as one of interstitial lawmaking in the sense of choosing between "federal common law" and state law on the basis of the supposed congressional intent, the Court has viewed its function as one of interpreting and enforcing the provisions of the federal constitution. At the risk of stating the obvious, we would point out that this is, after all, "the province and duty of the *judicial* department

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5. The public use limitation was briefly considered by the Committee on Water Power of the House. During hearings on S. 1419 Augustus S. Houghton representing the Conservation Commission of the State of New York testified that Section 21 would conflict with the New York Constitution because it would allow taking private property for private use which would be an abuse of the right of eminent domain. *Hearings on S. 1419 Before the Water Power Committee of the House,* 65th Cong., 2d Sess. 366 (1918) (statement of Augustus S. Houghton). Thereafter the Committee reported the bill to the House on June 28, 1918. The only comment on Section 21 was that "[s]ome members of the committee express a doubt as to the constitutionality of section 21 but a majority of your committee believe the same is constitutional and a proper provision to be included in the law." H. R. REP. No. 715, 65th Cong., 2d Sess. 20 (1918).

. . . ." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).[6]

The court of appeals, on the other hand, seems to have assumed that Congress has the power to define just compensation, either by setting its own rules or by reference to state law. Although Congress can and has on occasion conditioned the exercise of the power upon the payment of amounts over and above just compensation,[7] it has no right, authority or prerogative to determine what shall be the measure of compensation under the fifth amendment when private property is taken for public purposes. In *Monongahela Navigation Company v. United States*, 148 U.S. 312 (1893), this Court held unconstitutional an act of Congress which authorized the condemnation of a lock and dam owned by the navigation company, but which forbade any consideration of the value of its franchise to collect tolls in placing a value on the property being taken. The Court held:

> By this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the

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6. "The Court undoubtedly has both the power and the duty to fashion 'interpretative' implementing rules to fill out the meaning of generally framed constitutional provisions. This is simply an ancient aspect of the judicial function in construing the meaning of any text—constitutional, statutory, contractual, etc." Monaghan, *Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 22 (1975).

7. *See* Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §4601, *et seq.*; *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950).

> public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Id. at 327.

In a slightly different context, the Court has taken the same approach with regard to the deprivation of property under the due process clause of the fifth amendment in *Arnett v. Kennedy*, 416 U.S. 134 (1974):

> While the state may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition.

Id. at 185. (White, J. concurring in part and dissenting in part.)

> As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest [public employment] must be analyzed in constitutional terms.

Id. at 167. (Powell, J. concurring in part and concurring in the result in part.)

Quite apart from the interests of the instant parties, the decision of the Court of Appeals will have an adverse impact on the development of federally licensed water power projects and the costs to consumers of power produced by those projects. This issue was ably discussed by the Solicitor General in his amicus brief:

> A project's total costs, including its land acquisition costs, bear directly on its economic feasibility and hence

> on whether the project will be undertaken. And once a project is undertaken and completed, costs that were incurred for land acquisition are passed on to consumers in the price of the electric power generated. Investment in land acquisition is included in the rate-base determinations by the Commission when it regulates interstate wholesale rates for electric power, and by state utility commissions when they set rates for the intrastate sale of power. For these reasons, in light of the significant differences in land acquisition costs that may result from the choice between federal and state rules for measuring compensation, the choice of the legal standard is a matter of concern to the commission in carrying out its licensing functions.

Brief for United States as Amicus Curiae at 11-12, *Boswell v. Georgia Power Company*, 440 U.S. 907 (1979).

Finally, we would respectfully suggest that this issue is likely to recur. There are something in excess of 30 federal statutes (A105) which delegate the authority to exercise the federal eminent domain power to various government departments, agencies, cabinet secretaries, government corporations, public utilities and others. Under the opinion of the court of appeals it will be necessary to decide whether Congress intended federal law to control the determination of just compensation under each of these statutes or whether application of state law would frustrate or hinder an ongoing federal program.[8]

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8. The Court of Appeals attempted to distinguish cases which apply federal rules of valuation in condemnation actions on the theory that when the United States condemns and pays for the land "the federal interests involved differ markedly" 617 F.2d at 1119 from the situation in this case. The federal interests which it identified were 1) maximization of hydroelectric development, 2) reduced energy costs, and 3) minimization of cost to the government. *Id.* at 1120. However, these are the same federal interests which are at stake in government

(Continued on following page)

II.

The Decision of the Court of Appeals Conflicts With Prior Decisions of the Supreme Court and the Ninth Circuit.

The issue in this case has always been framed in terms of whether federal or state law supplies the rules to determine just compensation. In its most basic sense, however, what we are really dealing with in this case are the rules of evidence which guide the fact finder in arriving at a sum of money representing just compensation.

This Court held in *Monongahela Navigation Company* that just compensation within the meaning of the fifth amendment is the full monetary equivalent of the property taken. In order to determine this full monetary equivalent, the trier of fact of necessity has to take into account evidence of the value of the property on the date of taking. Facts regarding this value such as whether or not the announcement of the project has favorably influenced prices of comparable property in the neighborhood or whether the remainder will increase in value be-

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Footnote continued—
hydro projects, and the interests of the states in preserving their property laws are also the same. There are several government condemnation cases pending in the same district court from which these cases arose, and which are assigned to the same commissioners for trial. These cases, *United States v. 9.17 Acres of Land, etc.*, C.A. No. 79-55-ATH (M.D. Ga.); *United States v. 146.60 Acres of Land, etc.*, C.A. No. 78-57-ATH (M.D. Ga.), were brought to acquire projerty for the Richard B. Russell Dam and Lake Project which is being constructed by the Corps of Engineers. The federal government has just as much interest in developing hydroelectric power, reducing energy costs and minimizing construction expense at Lake Wallace as it does with the Russell Dam Project. The irony in all this is that under the theory of the court of appeals, Georgia Power Company will have to incur excessive and unrealistic land costs, but the government has reserved the right in Section 14 of the Act, 16 U.S.C. §807(a) to condemn the project at any time upon payment of just compensation which presumably would be calculated under federal rules.

cause of the project are the types of evidentiary questions which must be considered to determine the full monetary equivalent.

In *United States v. Miller*, 317 U.S. 369 (1943), this Court held that state law rules concerning what evidence may be considered by the fact finder "could not affect questions of substantive right,—such as the measure of compensation,—grounded upon the Constitution of the United States." *Id.* at 380. The opinion of the court of appeals in this case not only holds that state evidentiary rules regarding determination of just compensation can be relied upon, but that a district court in this circuit has no choice and must follow state law.

Richmond Elks Hall Association v. Richmond Redevelopment Agency, 561 F.2d 1327 (9 Cir. 1977), was an inverse condemnation action brought under the fifth amendment by a landowner against a federally assisted city redevlopment agency. The landowner contended that just compensation means not only the full monetary value of the property taken, but that it also includes litigation expenses and attorneys' fees. Relying on this Court's opinion in *Dohany v. Rogers*, 281 U.S. 362 (1930) the Ninth Circuit held that expenses of litigation and attorneys' fees are not includable in just compensation under the fifth amendment. It then rejected a contention by the landowner that state law (which provided for an award of costs and expenses to owners in inverse condemnation cases against public entities) should be adopted to determine the proper measure of compensation.

The Fifth Circuit, on the other hand, has required the adoption of state law as the appropriate federal rule, and if the law of the state in question required the payment of attorneys' fees and expenses, these amounts would be includable in a federal condemnation case.

Federally guaranteed rights set forth in the Bill of Rights should not have materially different dimensions in each of the states. Both the source of the right and its ultimate interpretation are unitary, and the conflicts identified above therefore justify the grant of the writ to review the judgment below.

CONCLUSION

We respectfully urge the Court, for all the reasons set forth above, to grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDIX

GEORGIA POWER COMPANY,
Plaintiff-Appellee,

v.

138.30 Acres of Land, situate, lying and being in Land Lot 327 of the 3rd Land District 389th G. M. District, Putnam County, Georgia, Defendant,
Mildred B. SANDERS, a/k/a Mrs. Karl D. Sanders, Jr., et al.,
Defendants-Appellants.

GEORGIA POWER COMPANY,
Plaintiff-Appellee,

v.

377.61 Acres of Land, situate, lying and being in Land Lots 367, 368, 369, 377, 378, 379, 380, 381, 382 and 383 of the Third Land District, 389th G. M. District, Putnam County, Georgia, Defendant,
Mrs. Nellie W. LARMAN, et al.,
Defendants-Appellants.

GEORGIA POWER COMPANY,
Plaintiff-Appellee,

v.

532.82 Acres of Land, situate, lying and being in the 145th G. M. District, Greene County, Georgia, Defendant,
Clifford H. DYAR, Jr., et al.,
Defendants-Appellants.

Nos. 77-1775, 77-1776 and 77-1777.
United States Court of Appeals,
Fifth Circuit.

May 27, 1980.

Appeals from the United States District Court for the Middle District of Georgia.

Before COLEMAN, Chief Judge, BROWN, AINSWORTH, RONEY, GEE, TJOFLAT, HILL, FAY RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, RANDALL, TATE, SAM D. JOHNSON, and THOMAS A. CLARK, Circuit Judges.*

RANDALL, Circuit Judge:

These condemnation cases present the issue whether compensation should be determined under federal law or under the law of the state where the condemned property is located when a licensee of the Federal Energy Regulatory Commission (the Commission)[1] exercises the power of eminent domain in federal court as authorized by Section 21 of the Federal Power Act, 16 U.S.C. § 814 (1976). If federal law is chosen, then the next issue for determination is whether the court should apply uniform national law or should apply, as federal law, the law of the state where the property is located. The panel held that federal law governed and the measure of compensation was to be determined under uniform national law. *Georgia Power*

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*Judge Goldberg was a member of the en banc court under 28 U.S.C.A. § 46(c) and participated in the oral argument of the case en banc. Since that time he has taken senior status and therefore does not participate in this decision. Judges Godbold and Anderson were recused and took no part in the consideration or decision of these cases. Judge Charles Clark took no part in the consideration or decision of these cases.

1. On October 1, 1977, the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission pursuant to the Department of Energy Organization Act, Pub.L. No. 95-91, 91 Stat. 565 (August 4, 1977). *See* 42 U.S.C.A. §§ 7101, *et seq.* (1978) at §§ 7151(b) (transfer of functions to Secretary of Energy) and 7172(a) (transfer of functions to Federal Energy Regulatory Commission).

Co. v. 138.30 Acres of Land, 596 F.2d 644, 649 (5th Cir. 1979) (hereinafter referred to as *Larman,* the name of one of the landowners in the proceeding). In so doing, the panel was bound by our prior decision in *Georgia Power Co. v. 54.20 Acres of Land,* 563 F.2d 1178 (5th Cir. 1977), *cert. denied,* 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979) (hereinafter referred to as *Dodson,* the name of one of the landowners in that proceeding). Because of the importance of the question at issue, we decided to have *Larman* reheard en banc (thereby vacating the panel opinion, 5th Cir. R. 17), to reconsider our holding in *Dodson. Georgia Power Co. v. 138.30 Acres of Land,* 602 F.2d 1243 (5th Cir. 1979). It is the opinion of a majority of the en banc court that *Dodson* was, in part, wrongly decided and, in that respect, should be overruled. We agree with *Dodson* that the source of law is federal but we now hold, contrary to *Dodson,* that the law of the state where the condemned property is located is to be adopted as the appropriate federal rule for determining the measure of compensation when a licensee of the Commission exercises the power of eminent domain pursuant to Section 21 of the Federal Power Act.

Parts I and II of the panel opinion in *Larman,* denominated "Right to a Jury Trial" and "Discretion to Appoint a Commission," (up to Part III, "Applicability of Federal Law," 596 F.2d at 648), are unaffected by our present decision on the choice of law issue and are, accordingly, approved and adopted by the court en banc. In Part IV of *Larman,* under the heading "Alleged Errors in the Commission's Final Report," the panel first set forth general principles relevant to commissions' reports, then discussed the commission's findings with respect to each of the properties involved and, finally, remanded for further fact findings and reevaluation of the compensation awarded each of the landowners. The portion of that section out-

lining general principles relevant to commissions' reports, (up to the subheading "Sanders Taking," 596 F.2d at 649), is unaffected by our present decision and is, therefore, approved and adopted by the court en banc. The balance of the discussion in that section, however, insofar as it is dependent upon the commission's application of federal common law to the determination of the amount of compensation, is rendered inapplicable by our holding that Georgia law supplies the appropriate federal standard and is superceded to that extent. Part III of the panel opinion, denominated "Applicability of Federal Law," is superceded in its entirety by this opinion.

In both *Dodson* and *Larman*, Georgia Power Company, a privately owned Georgia utility, instituted condemnation proceedings against Georgia landowners in federal court to acquire land for the Lake Wallace hydroelectric power generating project in Georgia. These proceedings were instituted pursuant to Section 21 of the Federal Power Act, authorizing persons or entities licensed by the Commission under Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e),[2] to exercise the right of eminent domain under specified circumstances. Section 21 provides as follows:

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2. Under 16 U.S.C. § 797(e) (1976), the Commission is authorized and empowered as follows:

> To issue licenses to citizens of the United States, or to any association of such citizens or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the

(Continued on following page)

> When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

The district judge appointed a three-member commission to determine the amount of compensation due the landowners. *See* Fed.R.Civ.P. 71A(h). The judge's instructions to the commission embodied federal rules for

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Footnote continued—

> surplus water or water power from any Government dam, except as herein provided: . . . *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto . . . .

Georgia Power was issued a license by the FPC for the Lake Wallace Project (then called the Laurens Shoals Project), on August 6, 1969. 42 F.P.C. 356 (1969).

determining just compensation. The landowners' requests to substitute for those instructions ones in accord with Georgia rules were denied. If Georgia law were applied, the amount awarded the landowners would be greater than it would be under federal law.[3] Under Georgia law, the value of any benefits accruing by virtue of the project to any part of the landowner's land which is not taken may be offset only against the recovery for damages to that remainder, if any, and not against the recovery for the value of the land actually taken. *See* Ga.CodeAnn. § 36-504 (1970). Under federal law, the value of any benefits accruing by virtue of the project to the portion of the tract not taken may be offset against the recovery for the value of the land actually taken. *Bauman v. Ross,* 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270 (1897); *United States v. Trout,* 386 F.2d 216 (5th Cir. 1967). Furthermore, under Georgia law, just compensation might include any increase in the value of the property caused by general knowledge of the project. *See Hard v. Housing Authority of Atlanta,* 219 Ga. 74, 132 S.E.2d 25 (1963). Under federal law, just compensation does not include any such increase in the value of the property. *United States v. Miller,* 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943).[4]

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3. In fact, in case No. 75-4448, the commission awarded no monetary compensation, a result which could not be reached under Georgia law. *Dodson,* 563 F.2d at 1180.

4. At the time *Dodson* was decided, under Georgia law, reasonable attorneys' fees would have been included in the award. *See White v. Georgia Power Co.,* 237 Ga. 341, 227 S.E.2d 385 (1976), *overruled, DeKalb County v. Trustees, Decatur Lodge No. 1602,* 242 Ga. 707, 251 S.E.2d 243 (1978). Since then, however, the Georgia Supreme Court has held that attorneys' fees need not be included in the measure of just compensation under the Georgia Constitution. *DeKalb County,* 251 S.E.2d 243 (overruling *White v. Georgia Power Co.* and its progeny).

It appears that the two differences in the method of determining just compensation under Georgia and federal law discussed in the text above are the key differences. In any event, they are the only ones mentioned specifically on appeal. Any questions concerning the exact parameters of Georgia law on this issue will have to be resolved on remand.

[1] We think it clear that the source of the eminent domain power at issue here is federal. Since Section 21 licensees derive their authority to exercise the power of eminent domain from the Federal Power Act, which was passed in the exercise of a "'constitutional function or power,'" *see United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726, 99 S.Ct. 1448, 1457, 59 L.Ed.2d 711 (1979) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366, 63 S.Ct. 573, 574, 87 L.Ed. 838 (1943)), their rights, as well, should derive from a federal source. 440 U.S. at 726, 99 S.Ct. at 1457. We think that, in this context, federal interests are "sufficiently implicated to warrant the protection of federal law." *Kimbell Foods*, 440 U.S. at 727, 99 S.Ct. at 1457-1458. Since the statute does not specify the appropriate rule of decision, the task of interstitial federal lawmaking falls upon the federal judiciary in this case "'to declare the governing law in an area comprising issues substantially related to an established program of government operation.'" *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593, 93 S.Ct. 2389, 2397, 37 L.Ed.2d 187 (1973) (quoting Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U.Pa.L.Rev. 797, 800 (1957)). Thus, the question which remains is whether the court should choose federal common law or state law as the applicable federal rule. *See, e. g., Kimbell Foods*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711; *Clearfield Trust*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838.

The answer to this question is largely dependent upon whether one begins with the position that state law should be adopted unless it is shown that legislative intent or other sufficient reasons exist to displace state law with federal common law or with the position that federal common law should be utilized unless it is shown that legis-

lative intent or other sufficient reasons exist to warrant adoption of state law. Basic considerations of federalism, as embodied in the Rules of Decision Act,[5] prompt us to begin with the premise that state law should supply the federal rule unless there is an expression of legislative intent to the contrary, or, failing that, a showing that state law conflicts significantly with any federal interests or policies present in this case. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966).

Our reading of Supreme Court decisions convinces us of the correctness of our approach.[6] In *Clearfield Trust*,

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5. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652 (1976).

6. Ample support for this presumption favoring adoption of state law as the federal rule is found in the law review commentaries. As Professor Wechsler has said regarding the role of federalism, "National action has always been regarded as exceptional in our policy, an intrusion to be justified by some necessity, the special rather than the ordinary case. . . . The political logic of federalism thus supports placing the burden of persuasion on those urging national action." Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L.Rev. 543, 544-45 (1954). *See also* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U.Pa.L.Rev. 797, 814 n.64 (1957) ("Our federalism, which the [Rules of Decision] act expresses, seems to posit generally that in case of doubt, the courts should use state law, leaving new extensions of federal power to the legislative body."); Comment, *Federal Courts—Choice of Controlling Law in Cases Involving Federally Insured Mortgages*, 49 N.C.L.Rev. 358, 365 (1971) ("If the philosophy of the Rules of Decision Act is applied in answering the second question of whether to adopt the local law as the federal rule, a presumption will arise that the state law is adopted. This presumption could be rebutted by a showing of sufficient federal interest for rejection of the local law as the federal rule."); Comment, *Rules of Decision in Nondiversity Suits*, 69 Yale L.J. 1428,

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federal law was chosen as the applicable federal rule to govern an action against the United States on a federal check. 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838. The Court stated:

> In our choice of the applicable federal rule we have occasionally selected state law. . . . But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

Id. at 367, 63 S.Ct. at 575 (citation omitted).

Footnote continued—

1446 (1960) ("In the absence of evidence of congressional intent to the contrary, state law would seem applicable under the Rules of Decision Act in all three cases [where a federal statute is involved and 1) a term of the act requires further definition; 2) no provision is made for certain matters; or 3) the statute regulates certain areas without indicating whether existing state law in that area is preempted or continues in force where the federal law does not specifically govern], for the statute does not 'otherwise require or provide.' Of course, courts examining the major purposes of the act may find that the application of state law will cause results contrary to the objectives sought by Congress. In some cases, the lack of uniformity itself may obstruct the operation of a statute even though none of the various results are by themselves objectionable. But this is, in effect, simply a finding of congressional intent not to be bound by state law. Without that finding, state law should be followed."). *Cf.* Comment, Adopting State Law as the Federal Rule of Decision: A Proposed Test, 43 U.Chi.L.Rev. 823, 826 (1976) ("when the source of law is federal, Congress or the Constitution '"require[s]"' otherwise than that state law [should] govern of its own force") (quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-93, 93 S.Ct. 2389, 2396-97, 37 L.Ed.2d 187 (1973)).

The choice of state law as the federal rule was thought to be similarly inappropriate in determining whether the United States could recover for damages suffered when a serviceman is injured by a third party tortfeasor. *United States v. Standard Oil Co.*, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947). Uniform national treatment, rather than diversified local disposition, was called for because of the distinctively federal nature of the government-soldier relation and because the question was primarily one of federal fiscal policy, of no particular concern to the states or their citizens. *Id.* at 310-11, 67 S.Ct. at 1609-10.[7]

In *Bank of America National Trust & Savings Ass'n v. Parnell*, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956), the Supreme Court held state law applicable, refusing to extend the *Clearfield Trust* rationale to litigation between private parties even though the suit involved federal commercial paper. The Court reasoned as follows:

> The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter. This is far too speculative far too remote a possibility to justify the application of federal law to transactions essentially of local concern.

352 U.S. at 33-34, 77 S.Ct. at 121.

In *Wallis v. Pan American Petroleum Corp.*, the Court held that state law governed the dealings of private par-

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7. Judge Wisdom viewed these early cases, *Clearfield Trust* and *Standard Oil*, as representative of a presumption favoring federal law, from which later cases departed. *Dodson*, 563 F.2d at 1188.

ties in an oil and gas lease issued under the Mineral Leasing Act of 1920. 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369. The Court there enunciated the following test:

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.

Id., at 68, 86 S.Ct. at 1304.[8]

In *Miree v. DeKalb County, Georgia,* 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977), the Court held state law applicable in an action against the county by survivors of deceased airline passengers who attempted to recover as third party beneficiaries of a contract between the county and the Federal Aviation Administration. The *Clearfield Trust* approach was inapplicable because the rights of private litigants alone were at issue. 433 U.S. at 30, 97 S.Ct. at 2494. Although the United States has a substantial interest in regulation of air travel and promotion of air travel safety, *id.* at 31, 97 S.Ct. at 2494, as was the case in *Parnell* and *Wallis,* any federal interest in the outcome of the specific question before the Court was " 'far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.' " *Id.* at 32-33, 97 S.Ct. at 2495-2496 (quoting *Parnell,* 352 U.S. at 33-34, 77 S.Ct. at 121-122).

Finally, in *Kimbell Foods,* decided after *Dodson,* the Court held that state law should be adopted as the appropriate federal rule for establishing priorities of competing federal (SBA and FHA) and private liens since a

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8. Judge Simpson viewed this language as "nearly, if not quite," establishing a "presumption favoring state law in choice of law cases." *Dodson,* 563 F.2d at 1194 (dissent).

national rule was unnecessary to protect the federal interests involved. 440 U.S. 718, 99 S.Ct. at 1453. The Court rejected what it considered "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect administration of the federal programs." *Id.* at 730, 99 S.Ct. at 1459. The government's argument that the special priority accorded federal tax liens was required here as well, since application of state law would undermine its ability to recover funds disbursed under the lending programs and thus would conflict with program objectives, was also rejected. *Id.* at 733-38, 99 S.Ct. at 1461-1464. The special priority the government commands in its tax collecting capacity was not warranted in this context where it was in substantially the same position as private lenders. *Id.*

The foregoing review of Supreme Court decisions leads us to the conclusion that they do indeed evidence "a growing desire to minimize displacement of state law," *Dodson*, 563 F.2d at 1189, and that conclusion strongly supports our position that state law should be adopted as the federal rule of compensation unless it is shown that legislative intent or other sufficient reasons exist to displace state law with federal common law.

[2] Our review of the relevant legislative history reveals no express congressional intent that federal common law and not state law should supply the federal rule in determining the measure of compensation in condemnation cases brought under Section 21. Therefore, we turn to an examination of the considerations relevant to the "nature of the specific governmental interests and to the effects upon them of applying state law." *Standard Oil*, 332 U.S. at 310, 67 S.Ct. at 1609. If the effect of applying state law is virtually to nullify the federal objectives, then there is a conflict that precludes application of state law. *See, e. g.*,

Little Lake, 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187. If application of state law would arguably interfere with an identifiable federal policy or interest, but not amount to a conflict which would preclude application of state law, we must proceed to an examination of the relative strength of the state's interests in having its rules applied. *See United States v. Yazell*, 382 U.S. 341, 351-53, 86 S.Ct. 500, 506-07, 15 L.Ed.2d 404 (1966); *cf. Little Lake*, 412 U.S. at 599, 93 S.Ct. at 2400 (although adoption of state law was precluded because it conflicted with the federal program regarding federal land acquisitions under the Migratory Bird Act, the Court stated that its conclusion might conceivably be influenced if the retroactive state statute sought to be applied served "legitimate and important state interests the fulfillment of which Congress might have contemplated through application of state law"); *Wallis*, 384 U.S. at 68, 86 S.Ct. at 1304 (not reaching the issue since no significant threat was found). *See generally* Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U.Chi.L.Rev. 799 (1976).

[3] While we do not deny the existence of important federal interests in issues arising under the Federal Power Act (indeed, that is the basis for our decision that federal law governs in the first place), we are of the opinion that the interests of the United States in the determination of the amount of compensation a private licensee must pay a landowner in a condemnation proceeding under Section 21 are not sufficient to warrant displacement of state law on that issue. Before a license may be issued under the Federal Power Act, there must be a determination by the Commission that the project does not affect the "development of any water resources for public purposes [that] should be undertaken by the United States itself." 16 U.S.C. § 800(b). Thus, by definition, a licensed project does not implicate the interests of the United States to the

degree that it is thought desirable that the project be undertaken by the United States itself. We find persuasive and relevant to determining the nature of federal and state interests in this case the distinction observed by the Ninth Circuit in *Public Utility District No. 1 v. City of Seattle*, 382 F.2d 666, 669-70 (9th Cir.), *cert. dismissed*, 396 U.S. 803, 90 S.Ct. 22, 24 L.Ed.2d 59 (1969) (even though it was made in support of its finding, which we deem erroneous, that Section 21 does not delegate full eminent domain power):

> We first observe that the position of a licensee is distinguishable from that of the United States with respect to furthering of the national interest. By issuance of a license the United States is not acting in the national interest through the licensee to the same extent as it would if it undertook the project itself. The United States acts in the public interest on a national scale; the licensee often on a local scale, on projects thought to be of insufficient dimensions to warrant the assertion of national power. In many cases the requirements of federal permission and regulation are all that the national interest requires. Frequently the licensee is a privately owned utility or even manufacturer, seeking the license for purposes of profit.

Although federal rules have been applied to the determination of just compensation in federal condemnation cases where the United States is the party condemning and paying for the land,[9] we do not deem those decisions

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9. *See, e. g. United States v. Miller*, 317 U.S. 369, 380, 63 S.Ct. 276, 283, 87 L.Ed. 336 (1943); *United States v. Certain Property Located in Borough of Manhattan*, 344 F.2d 142, 146 (2d Cir. 1965); *United States v. City of New York*, 165 F.2d 526, 528 (2d Cir. 1948) (L. Hand, J.); *United States v. Certain Parcels of Land*, 144 F.2d 626, 628 (3d Cir. 1944); *United States v. 3,595.98 Acres of Land*, 212 F.Supp. 617 (N.D.Cal.1962).

controlling[10] since our case arises in the context of a Section 21 proceeding by a licensee where the nature of the

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10. The majority in *Dodson* denied being bound by those cases but was of the opinion that those decisions were helpful starting points even though they did not involve federal condemnations by Section 21 licensees. Judge Wisdom wrote:

> Other courts in federal compensation cases have balanced the state and federal interests and have concluded that federal, rather than state, law should supply the rules of compensation. Unless we find the weights on our scale to be substantively different, we see no reason to diverge from the conclusion of the Supreme Court and some of our Courts of Appeals.

Dodson, 563 F.2d at 1186, n. 21. While a decision to apply federal rules of compensation might implicitly involve a determination that federal interests outweigh state interests, we do not find the cases cited persuasive since they contain no express interest analysis, which may be indicative of the importance attached to the presence of the United States as the condemnor in those cases.

In support of its contention that there is no need to balance any interests in this case, Georgia Power Company places great reliance on *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), where the court refused to apply the law of the state (which, unlike federal law, awards costs and expenses, including attorneys' fees, to landowners who obtain judgment in inverse condemnation actions against public entities) in a successful inverse condemnation action brought under the Fifth Amendment against a federally assisted city redevelopment agency. The Ninth Circuit viewed the Supreme Court's reasoning in a Miller Act case, *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974), controlling. The Miller Act provides a remedy for suppliers and subcontractors who perform services or provide material for a contractor in connection with construction on federal property who must bring suit to recover money owed them by the contractor. 40 U.S.C. § 270a *et seq.* (1976). In *F. D. Rich Co.*, the Supreme Court stressed the importance of a uniform national rule and reversed the Ninth Circuit's holding that the Miller Act requires an award of attorneys' fees where the "public policy" of the state in which suit is brought allows an award of fees in similar contexts. One reason for reversal was expressed as follows:

> Although the court below premised its decision on the theory that a Miller Act remedy is afforded " 'in lieu of the lien upon land and buildings customary where property is owned by private persons,' " it gave respondent more protection than California law affords litigants involved in disputes arising from private construction projects who are not entitled to an

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federal interests involved differs markedly from the nature of the federal interests involved where the United States is the condemnor. Furthermore, while also not controlling, there is authority for the application of state law to questions concerning compensation, such as admissibility of evidence of consequential damages and the propriety of interest on a compensation award in condemnation actions brought in federal court under Section 21. *See, e. g. Feltz v. Central Nebraska Public Power & Irrigation Dist.*, 124 F.2d 578 (8th Cir. 1942).[11]

Footnote continued—

> award of attorneys' fees. We think it better to extricate the federal courts from the morass of trying to divine a "state policy" as to the award of attorneys' fees in suits on construction bonds.

417 U.S. at 128, 94 S.Ct. at 2164. The Court also pointed out that "[m]any federal contracts involve construction in more than one State, and often, as here, the parties to Miller Act litigation have little or no contact, other than the contract itself, with the State in which the federal project is located." *Id.* at 127, 94 S.Ct. at 2164. In view of the foregoing analysis, discussing federal and state interests, we do not think *Richmond Elks Hall* lends much support to Georgia Power's theory that there is no need to balance interests and we do not deem controlling on the issue before us the following language from *F. D. Rich Co.* quoted by the court in *Richmond Elks Hall*:

> The Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law. Neither respondent nor the court below offers any evidence of congressional intent to incorporate state law to govern such an important element of Miller Act litigation as liability for attorneys' fees. [*F. D. Rich Co.*, 417 U.S.] at 127, 94 S.Ct. at 2164.

561 F.2d at 1334. Furthermore, we note that unlike Section 21 licensees, the redevelopment agency in *Richmond Elks Hall* was federally funded.

11. *See also Central Nebraska Pub. Power & Irrigation Dist. v. Harrison*, 127 F.2d 588 (8th Cir. 1942); *Central Nebraska Pub. Power & Irrigation Dist. v. Fairchild*, 126 F.2d 302 (8th Cir. 1942); *Samuelson v. Central Nebraska Pub. Power & Irrigation Dist.*, 125 F.2d 838 (8th Cir. 1942); *Burnett v. Central Nebraska Pub. Power & Irrigation Dist.*, 125 F.2d 836 (8th Cir. 1942); *McGinley v. Central Nebraska Pub. Power & Irrigation Dist.*, 124 F.2d 692 (8th Cir. 1942); *Central Nebraska Pub. Power & Irrigation Dist. v. Berry*, 124 F.2d 586 (8th Cir. 1942).

The overriding federal interest at stake in a case such as this one is in implementing or effectuating the federal program. Thus, if state law is so hostile that its application would actually frustrate this objective, a conflict exists which precludes adoption of state law as the federal rule. *See Little Lake,* 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187. The specific federal interests or policies which may be identified under the Federal Power Act are 1) maximization of hydroelectric development, 2) reduced energy costs and 3) minimization of cost to the government should it decide to exercise its option to acquire a project at the expiration of the license term, upon payment of "net investment," not exceeding the "fair value" of the property taken, under Section 14(a) of the Federal Power Act, 16 U.S.C. § 807(a) (1976).[12] *See First*

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12. Section 14(a) of the Federal Power Act provides as follows:

> Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 796 of this title, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project for projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission

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Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 171-74, 180, 66 S.Ct. 906, 915-16, 919, 90 L.Ed. 1143 (1946). *See generally* J. Kerwin, *Federal Water-Power Legislation* (1926).

It is clear to us that application of state law to the narrow question of the determination of the amount of compensation a licensee must pay a landowner does not nullify federal objectives and does not result in a conflict which would preclude application of state law. In *Little Lake*, application of a state statute retroactively making mineral rights imprescriptible would have deprived the federal government of its previously bargained for contractual interests in mineral rights and would have cre-

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> under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

16 U.S.C. § 807(a)(1976). The option provision has been cited as illustrative of the "closensss of the relationship of the Federal Government to these projects and its obvious concern in maintaining control over their engineering, economic and financial soundness." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 172-73, 66 S.Ct. at 906, 90 L.Ed. 1143 (1946). *See also id.* at 181 n. 25, 66 S.Ct. at 920, n. 25. The government, however, in its amicus brief to the Supreme Court on petition for certiorari in *Dodson*, brief for United States at 12, *Boswell v. Georgia Power Company*, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979), described the governmental interest arising from this option as a "less important federal interest" since it cannot be predicted with confidence that many licensed projects will be recommended for federal take-over as their terms expire. Since under Section 7(b) of the Act, 16 U.S.C. § 800(b), approval may not be given for any application for a project when the Commission finds that "the development of any water resources for public purposes should be undertaken by the United States itself," the landowners argue that exercise of the option is unlikely because it will have already been determined that it was unnecessary for the United States to undertake the project initially.

ated uncertainty in the land acquisition program embodied in the Migratory Bird Conservation Act, 16 U.S.C. § 715 *et seq.* The Court held that "borrowing" state law in this case would be inappropriate since "specific aberrant or hostile state rules do not provide appropriate standards for federal law." *Little Lake,* 412 U.S. at 595-96, 93 S.Ct. at 2398. Georgia Power Company argues that it would likewise be inappropriate to apply Georgia law to the computation of just compensation in condemnation actions in federal court under Section 21 since, especially in its allowance of enhanced value resulting from knowledge of the project, as to which it is admittedly in the minority,[13] the Georgia law is sufficiently aberrant and hostile to the energy program embodied in the Federal Power Act. We do not agree that application of a state law which results in higher awards to the landowners, even when aspects of that law represent the minority position, amounts to the kind of conflict which precluded adoption of state law in *Little Lake.* Compare *Yazell,* 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404, where the Court held that state law governed in a suit by the United States to collect a debt owed the SBA even though application of that particular state law precluded the government's recovery. The Court recognized that the state's law of coverture, successfully

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13. The Supreme Court of Georgia answered contentions that only Georgia has a rule allowing enhancement in value resulting from the improvement as follows:

> To such contentions we would reply further by paraphrasing a statement of a great president who once said, "Everybody is against me—everybody except the people," by saying that all the decisions are against what we hold—all except the controlling decisions of the courts of Georgia. On this point in *Green v. Coast Line Railroad Co.,* 97 Ga. 15, at pages 36 and 37, 24 S.E. 814, at page 822, 33 L.R.A. 806, this court said: "Every direct authority known to us is against us. Nevertheless, we are right, and these authorities are all wrong, as time and further judicial study of the subject will manifest."

Hard v. Housing Authority of Atlanta, 219 Ga. 74, 132 S.E.2d 25, 30 (1963).

invoked by the debtor, was "peculiar and obsolete" and had even been repealed in Texas subsequent to the events in the case. 382 U.S. at 351, 86 S.Ct. at 506. Nevertheless, the Court declined to override the state law because

> state interests, particularly in the field of family and family-property arrangements . . . should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.

Id. at 352, 86 S.Ct. at 507.

Although application of state law resulting in higher condemnation costs to the licensee is not precluded, nevertheless, since application of the state law arguably burdens or interferes with the three federal interests or policies enumerated above, we must weigh the federal interest in avoiding this interference against the state interest in having its law applied.

In any case involving the issue of choice of federal or state law, the desirability of uniformity achieved by application of federal common law may be advanced. Where, however, as here, uniformity bears little relation to the federal program at issue,[14] it does not weigh heavily

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14. We take the opportunity to note at this juncture that the Federal Power Act does not represent an attempt by Congress to provide for application of uniform national law to all aspects of hydroelectric development under the Act. Examining the legislative history which primarily indicates congressional desire to insure the passage and constitutionality of the Act in order to promote the long needed development of water power, the Supreme Court cited as illustrative of the integration of state and federal jurisdiction, which carefully preserves the separate interests of the states, the following provisions:

> [Section] 4(a) and (c), cooperation of the Commission with the executive departments and other agencies of the State and National Governments is required in the investigation of

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in favor of application of uniform federal law. Furthermore, since a licensee often has the option of utilizing

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Footnote continued—

> such subjects as the utilization of water resources, water-power industry, location, capacity, development costs and the relation to markets of power sites, and the fair value of power. § 4(f), notice of application for a preliminary permit is to go to any State or municipality likely to be interested. § 7(a), in issuing permits and licenses preference is to be given to States and municipalities. § 10(e) licenses to States and municipalities under certain circumstances shall be issued and enjoyed without charge. § 14, a right is reserved not only to the United States but to any State or municipality to take over any licensed project at any time by condemnation and payment of just compensation. §§ 19 and 20, regulation of service and rates is preserved to the states.

First Iowa Hydro-Electric Coop., 328 U.S. at 174-75 n. 19, 66 S.Ct. at 916, 917 n. 19. This integration refutes any argument that failure to promote ease in federal administration through adoption of uniform national standards of compensation significantly undermines operation of the energy program. We think that Sections 19 and 20, 16 U.S.C. §§ 812 and 813, expressly limiting the Commission's authority to regulate rates and other charges, which are directly related to energy costs, to situations where a state does not have its own regulations, is telling of the absence of intent to apply uniform federal law to the compensation question.

Although cost of land acquisition is included in rate-base determination by the Commission in regulating interstate wholesale rates for electric power and by state utility commissions setting rates for the intrastate sale of power, the government conceded in its amicus brief to the Supreme Court on petition for certiorari in *Dodson*, brief for United States at 12 n. 11, *Boswell v. Georgia Power Company*, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979), that "the Commission has not either in its rules and decisions determining what costs for hydroelectric projects are allowable under 16 U.S.C. 797(b) [determination of "actual legitimate original cost of and the net investment in a licensed project"] or in its rules and decisions governing rate-making by interstate wholesalers of electricity and natural gas, developed a standard favoring the use of either federal or state criteria in the valuation for land acquisition purposes." *See also Grand River Dam Auth. v. Grand Hydro*, 335 U.S. 359, 374-75, 69 S.Ct. 114, 121-122, 93 L.Ed. 64 (1948) (discussing materiality of fact that valuations are used in determination of rates and net investment; holding that Federal Power Act does not displace state rules of compensation where a licensee relies only on the powers of eminent domain granted by the state; leaving open the questions of the proper measure of value in a condemnation proceeding instituted by the United States [since settled in favor of application of

(Continued on following page)

either state or federal eminent domain power (as Georgia Power Company has with respect to most, if not all, of the land taken for the Lake Wallace project), application of uniform federal law when a licensee proceeds under the federal power authorized by Section 21 could result in a corresponding loss of uniformity even in a single project.[15] Of course, distinguishing cases where the United States is the condemning party from cases where a licensee is the condemnor, applying federal law to determine the measure of compensation in the former but not in the latter, might be thought to be equally lacking in uniformity and undesirable.[16] Since national uniformity is not specifically related to the operation of the Federal Power Act and since application of either federal or state law may result in a corresponding loss of uniformity,

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Footnote continued—
federal law, *United States v. Twin City Power Co.*, 350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240 (1956)] or by one of its licensees under Section 21).

15. We express no opinion as to whether Congress had the power to compel "application of a uniform, *federal* standard in *any* exercise of eminent domain power, state or federal, to acquire land on which to build these federally regulated facilities" as contended by Judge Simpson, *Dodson*, 563 F.2d at 1200 (dissent) and disputed by the majority, *id.* at 1183 n. 16.

We agree with the majority in *Dodson* that the landowners' arguments that impermissible forum shopping and denial of equal protection may result from application of different standards of compensation when a licensee has the option of proceeding under state or federal powers of eminent domain are without merit. *Id.* at 1191-93.

16. Indeed, the same lack of uniformity in a single project could result if state law is applied to determine compensation when a licensee condemns the property and if federal law is applied to determine the "fair value" to which "net investment" is limited when the United States exercises its take-over option under Section 14. We note that, as pointed out by Judge Simpson, problems of interpretation of "net investment" emphasize that "whether the price paid by a state party in a Section 21 condemnation will affect the price later paid by the federal government in exercising its option under Section 14 is by no means certain." *Dodson*, 563 F.2d at 1198 n. 11. *See also Grand River Dam. Auth. v. Grand Hydro*, 335 U.S. at 374-75, 69 S.Ct. at 121-22.

arguably cancelling out the advantage otherwise gained, we do not count this argument in either side's favor.[17]

In analyzing the state's interests in having its laws of compensation apply when a licensee exercises the power of eminent domain under Section 21 of the Federal Power Act, we begin with the state's interest in avoiding displacement of its laws in the area of property rights, traditionally an area of local concern. Since property has been viewed as a bundle of valuable rights and since the question of what constitutes property is usually determined with reference to state law,[18] we think it consistent that the value of those rights also be determined with reference to state law. Since states, as well as the federal government, have an interest in providing economical energy to their citizens, their laws of compensation, accommodating that interest with that of insuring that their condemnee-landowner citizens are compensated in accord with their (states') views of what is just, are entitled to weight. As pointed out by the landowners, a Section 21 licensee-condemnor is typically either the state itself, a state-owned entity, a municipality or a private utility, organized and operating under the laws of the state and heavily regulated by a state utility commission. A licensee usually condemns property for a project and sells electricity produced therefrom only in the state where it operates. This case, for example, involves a

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17. Another argument traditionally advanced in cases involving the issue of choice of state or federal law is that greater certainty may be achieved by application of well established state law on an issue as to which there is no established body of federal common law. As pointed out by the majority in *Dodson*, that argument carries no weight in this case since there is an established body of federal law on the issue of just compensation. *Dodson*, 563 F.2d at 1189-90. While that fact does not further the argument that state law should be adopted in this case, we do not view it as significantly detracting from it.

18. *See, e. g., United States v. Certain Property Located in Borough of Manhanttan*, 344 F.2d 142, 144-45 (2d Cir. 1965) (Friendly, J.); *United States v. 145.30 Acres of Land*, 385 F.Supp. 699 (W.D.La.1974), *aff'd*, 524 F.2d 1231 (5th Cir. 1975).

private corporation using private funds to take private property from a private landowner.

Georgia Power Company asserts that the application of Georgia law as the federal rule of compensation in these cases will result in higher land acquisition costs than those which would have obtained if the law applicable to cases in which the federal government is the condemnor were applied.[19] Georgia Power goes on to assert that because those costs will ultimately be recovered from consumers of hydroelectric power in the form of higher charges for power, the selection of Georgia law will impermissibly burden the achievement of one of the principal objectives of the Federal Power Act, inexpensive hydroelectric power. Assuming that the effect of the application of Georgia law will be higher cost to the consumer, nevertheless, we disagree with the conclusion that the result is an impermissible burden on the achievement of the objectives of the Federal Power Act. To apply federal law because of the decreased cost to the consumer as compared to the cost to the

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19. We do not view as highly probative the conflicting assertions of the parties in their supplemental briefs on rehearing en banc concerning the inferences which should be made regarding the effects of the energy program of increased costs of condemnation based largely on certain statistics gleaned from the report of the United States Department of Energy, Energy Information Administration, Hydroelectric Plant Construction Cost and Annual Production Expenses 1976, Twentieth Annual Supplement (May 1978). The landowners argue basically that since a substantial number of projects were developed through the use of state laws of condemnation, we may conclude that use of state law does not retard hydroelectric development. While this appears to us to be largely conjectural, the argument that use of state law does retard hydroelectric development does not appear significantly less so.

The landowners also assert in their en banc briefs that the Wallace Dam project was budgeted in anticipation that state law would control the setting of just compensation. The Power Company vigorously denies that this was the case. We decline to give weight to this disputed assertion. *Cf. Kimbell Foods*, 440 U.S. at 729-32, 99 S.Ct. at 1459-61; *Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404.

consumer which would result if Georgia law were applied is to require certain Georgia landowners partially to subsidize a private Georgia utility and consumers of electric power in a way which would not be required of them if Georgia law were applied. In the absence of an indication of specific legislative intent to impose such a burden on Georgia landowners, we will not presume that Congress would have balanced the interests of private licensees and consumers of hydroelectric power, on one hand, and the property owners, on the other hand, in a fashion different from the way in which the laws of the State of Georgia balance such interests.

As is demonstrated by the persuasiveness of the well-reasoned positions advanced by both the majority and the dissent in *Dodson*, the choice of law question in this case is a close one. A majority of this court, however, is of the opinion that absent a showing of legislative intent to the contrary considerations of federalism warrant a preference for adoption of state law as the federal rule. We do not find the showing of federal interest and the effect thereon of applying state law sufficient to overcome that preference in this case. Thus, we are led to the conclusion that the law of the state where the condemned property is located is to be adopted as the appropriate federal rule for determining the measure of compensation when a licensee exercises the power of eminent domain pursuant to Section 21 of the Federal Power Act.

The judgments of the district court are VACATED and the cases are REMANDED for further proceedings consistent with this opinion.

VACATED and REMANDED.

FAY, Circuit Judge, concurring:

In this era of ever-groping federal tentacles, perhaps it is quixotic to brandish one small sword in a crusade against further invasion of the powers of states. With the hope that this battle cry will not be a last gasp, I will charge forward with the apparently anachronistic views that states are sovereigns, that states do control property and property rights. A significant conflict between federal and state interests must exist to preempt state control. Trimmed to the bone, the facts of this case are that a private, Georgia utility company desires privately-owned Georgia land from Georgia citizens for a private hydroelectric power and recreation project in Georgia to supply power to Georgia citizens and to provide profit to private investors. In looking to define "just compensation" when such a private, state-controlled utility company exerts the eminent domain power to acquire private land, federal law should not control the inquiry. I therefore concur in the majority result, although I would have reached that holding by a different route.

Despite the danger of appearing to have surrendered this battle, I will also suggest an additional basis for preferring state laws as federal rules of decision.

A. *States Control Property*

A helpful, if overly simplified, starting point may be to sketch out several types of state-federal relationships. In some instances, the Constitution forbids states to act, or grants the federal government exclusive power to act. In these subject areas, state action is precluded. At the opposite end of the spectrum are the powers the Constitution reserves to the states.[1] In those areas, congressional au-

1. It is probably the height of naivety to recall that some of us were taught that the federal government received its powers through delegation and that powers and authority not specifically prohibited to the states nor delegated to the United States were retained by those same sovereign states. U.S.Const. amend. X.

thority to regulate states is limited. *See, e. g., National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). Between these poles are areas that Congress has the power to regulate, and Congress either does or does not act. If Congress has not acted, state law is usually effective. If Congress has acted, and state law conflicts, the supremacy clause requires preemption of the state law, although Congress can designate state law to be applicable. At times Congress partially exercises its powers, leaving open some questions of applicable law. In those instances, the courts decide whether federal or state law applies, under the rubric of determining the choice of law or the rule of decision.

Essentially four situations exist, therefore, in which state law may apply: when Congress expressly adopts state law, when Congress has not exercised its powers, when Congress has acted leaving some areas open, and when the tenth amendment[2] requires state law to apply of its own force. In cases involving the latter three situations, the courts must determine whether state law applies, of its own force or otherwise, and, except in some tenth amendment situations, whether it conflicts with federal programs or policies. The determination requires an inquiry into the traditional, constitutional allocation of power over subject matters between state and federal governments.

My objection to the current framework for determining choice of law is that it stands on its head the proper order of questions, losing sight of the inquiry into constitutional allocations of power. The path to choice between a federal or state rule has acquired many steps. First, the court decides whether the source of the right is

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2. Reference to the tenth amendment is not meant to be exclusive but rather primary. *See also* U.S.Const. amend. XXI.

state or federal. If the source is federal, the court inquires whether Congress has provided that either federal or state law should govern. In the absence of congressional statement, the court considers whether the federal rule should be to adopt state law, or to apply or fashion a uniform federal rule. In answering this question, the court initially determines whether use of state law will truly conflict with effectuation of federal policies or programs. If the answer is "no," the court balances federal interests in uniformity against the state's interests in spheres traditionally left to local control.

In my view the initial inquiry should be into what the competing subject areas are. The first step should be a determination of whether the subject area is one traditionally left to state control, not whether the source of right is state or federal. Especially when dealing with those powers left to the states, the courts should tread gingerly to the conclusion that Congress has preempted the field. *See Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581, 99 S.Ct. 802, 808, 59 L.Ed.2d 1 (1979); *Santa Fe Industries, Inc. v. Green,* 430 U.S. 462, 477-80, 97 S.Ct. 1292, 1302-05, 51 L.Ed.2d 480 (1977); *United States v. Yazell,* 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). Indeed, a premise to the interstitial choice of law rulemaking is that Congress has not spoken, and therefore it should be rare to uncover an intent to preempt state law. Perhaps this explains why state law is adopted as the federal rule in so many choice of law cases.

Instead of focusing on the allocation of state-federal control over the subject areas, the current choice of law analysis requires looking to the source of the right in question. Very little space is spent discussing this threshold inquiry. If the source of right is determined to be federal, the requirements of *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the Rules of De-

cision Act[3] do not apply to cause state law to operate of its own force. The source of right is held to be federal whenever the case involves the Constitution, *Clearfield Trust Co. v. United States,* 318 U.S. 363, 366-67, 63 S.Ct. 573, 574, 75, 87 L.Ed. 838 (1943); see *Butner v. United States,* 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979); a federal statute, *UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966); a federal relationship, *United States v. Standard Oil Co.,* 332 U.S. 301, 305-06, 67 S.Ct. 1604, 1606-07, 91 L.Ed. 2067 (1947); a federal program, *United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 726-27, 99 S.Ct. 1448, 1457-58, 59 L.Ed.2d 711 (1979); *United States v. Little Lake Misere Land Co.,* 412 U.S. 580, 592, 93 S.Ct. 2389, 2396, 37 L.Ed.2d 187 (1973); an implied federal cause of action, *Burks v. Lasker,* 441 U.S. 471, 476-77, 99 S.Ct. 1831, 1836, 60 L.Ed.2d 404 (1979); a federal agency, *United States v. Security Trust & Savings Bank,* 340 U.S. 47, 71 S.Ct. 111, 95 L.Ed. 53 (1950); or a federal contract, *United States v. Allegheny,* 332 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209 (1944).

In a world in which the ever-burgeoning federal government colors most aspects of life, this federal nexus is rarely lacking, and, accordingly, state law rarely applies of its own force.[4] Indeed, these choice of law cases normally arise in federal court, and, absent diversity, presumably need some federal connection to enter the federal halls of justice. Therefore the question posed in the first step of

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3. *See* note 7 *infra.*

4. In a review of the choice of law cases, one is impressed with how infrequently the source of right is *not* federal. In *United States v. Yazell,* 382 U.S. at 357, 86 S.Ct. at 509, the Court left unanswered whether state law applied of its own force or as a federal rule. Perhaps if the source of right is state law, the courts immediately move into standard preemption analysis. *See Ferri v. Ackerman,* ..... U.S. ....., 100 S.Ct. 402, 62 L.Ed.2d 355 (1979).

the prevailing choice of law analysis is often answered the instant the action is commenced.

Perhaps it is splitting hairs to argue over the means for selecting state law as the rule of decision so long as that result is reached in the majority of cases. I, for one, however, find an inherent harm in this usurpation of state power contrary to the precepts of federalism even if the displacement is in name only. But the characterization of the source of the question as federal goes beyond the appellation. First, the courts still may reject state law that conflicts with or is hostile to federal policies, or is aberrant. Although prevailing preemption analysis might also weed out conflicting state rules, to call the source federal casts uncertainty over whether, in any particular case, that state's law will apply, or will be found lacking in federal court. Second, characterizing the source as federal binds state courts to follow the federal rule. Third, by entitling the source federal, state conflicts of law rules will not apply, even if the state law is adopted as the federal rule. *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Fourth, the characterization and subsequent steps of the analysis relegate state interests to a simple balancing against federal policies rather than requiring a focus on constitutional allocations and unconstitutional infringements of power.

In this case, the open question is one of property law, one of the few areas traditionally left to the states. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 605-08, 93 S.Ct. 2389, 2403-05, 37 L.Ed.2d 187 (1973) (Stewart & Rehnquist, J.J., concurring); *United States v. Yazell*, 382 U.S. 341, 352-58, 86 S.Ct. 500, 506-10, 15 L.Ed.2d 404 (1966); *United States v. Burnison*, 339 U.S. 87, 89, 70 S.Ct. 503, 504, 94 L.Ed. 675 (1950); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155-56, 64 S.Ct. 474, 480-81, 88 L.Ed. 635 (1944); *see also Sunderland v. United States*, 266

U.S. 226, 232-34, 45 S.Ct. 64, 65, 69 L.Ed. 259 (1923). The Supreme Court sometimes mentions this tradition of state property control when choosing the federal rule. *E. g. Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979); *United States v. Brosnan*, 363 U.S. 237, 241-42, 80 S.Ct. 1108, 1111-12, 4 L.Ed.2d 1192 (1960); *RFC v. Beaver County*, 328 U.S. 204, 210, 66 S.Ct. 992, 995, 90 L.Ed. 1172 (1946). The property question arises between a Georgia landowner and a privately-owned, Georgia utility company over land in Georgia condemned for a Georgia power project. Grant of a federal license is conditioned on the project's being one that the United States should *not* undertake. 16 U.S.C. § 800(b) (1976). The major purpose of the Federal Power Act was to remove impediments to development of local power plants by granting licensees permission to infringe upon the federal navigational servitude.[5] Under these circumstances state law should govern the definition of just compensation!

It is true that section 21 appears to grant licensees some eminent domain power, though it may be limited. *See Public Utility District No. 1 v. Seattle*, 382 F.2d 666, 669-73 (9th Cir. 1967). *But see Dodson*, 563 F.2d 1178, 1187-88 (5th Cir. 1977). To call the source federal and to apply the choice of law analysis, however, skips the questions of whether Congress can constitutionally act in the property area, and whether Congress can constitutionally delegate the federal eminent domain power to private individuals or other legal entities and immunize such recipients from the

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5. *See Public Utility District No. 1 v. Seattle*, 382 F.2d 666, 671 (9th Cir. 1967). Before the Federal Water Power Act of 1920 was enacted, the Rivers and Harbors Act of 1890 restricted construction of bridges, piers, and abutments on navigable streams. Additional legislation in 1899, 1906, and 1910 allowed construction of dams upon passing of a special bill in Congress but provided no protection for investors and permitted forfeiture or government take-over at any time. *See* H.R.Rep.No.61, 66th Cong., 1st Sess. ..... (1919).

requirements of state law.[6] I would not be so quick to displace state supremacy over property within its borders, especially when the federal interests are so slight.

B. *State Law Preference*

While I depart from the majority on the route it took, I agree that state law governs. Although "considerations of federalism"[7] provide one ground for preferring state law, another fundamental constitutional principle supports electing state law as the tie breaker. As vital to our system as the notion of federal and state sovereignty is the concept of the separation of powers of the three federal governmental branches. If state law is not utilized, the federal

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6. In *Dodson*, the majority concluded that the delegation was constitutional by analogy to the Natural Gas Act, upheld in *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644 (5th Cir.), *cert. denied*, 340 U.S. 829, 71 S.Ct. 66, 95 L.Ed. 609 (1960). 563 F.2d 1178, 1181. *Cf. Public Utility District No. 1 v. Seattle*, 382 F.2d 666 (9th Cir. 1967) (Congress has not bestowed the full measure of its eminent domain power on licensees, especially since licensees are often private companies operating for profit, not for a national interest).

7. The majority finds the roots of federalism in the Rules of Decision Act. As suggested by note 6 of the majority opinion, however, commentators debate whether the Rules of Decision Act applies when the source of law is federal. If the source is federal, "the Constitution or Treaties of the United States or Acts of Congress" may "otherwise require" than that state laws be rules of decision. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-93, 93 S.Ct. 2389, 2396, 37 L.Ed.2d 187 (1973). *See* Note. *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 *U.Chi.L.Rev.* 823, 826 n.23 (1976). Other commentators believe that the Rules of Decision Act incorporates international conflicts of law principles to restrict the "cases where they [state rules] apply" to ones involving intra-territorial situations. R. Bridwell & R. Whitten, *The Constitution and the Common Law* 78-87, 99, 129-30 (1977). Although a question of federal source might involve a totally intrastate transaction, such as this one involving Georgia parties and Georgia property, it also might cover a setting in which choice of state law might force its application to cases with extraterritorial circumstances. Nevertheless, federalism principles do support a preference for choosing state law, regardless of whether those principles are embodied in the Rules of Decision Act or extracted from the Constitution's structing of the federal system.

courts must decide whether to fashion a federal rule, a process that may encroach on the legislative powers reserved to Congress.[8] *See Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1304, 16 L.Ed.2d 369 (1966); *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701, 86 S.Ct. 1107, 1110, 16 L.Ed.2d 192 (1966); *United States v. Standard Oil Co.*, 332 U.S. 301, 313-16, 67 S.Ct. 1604, 1610-12, 91 L.Ed. 2067 (1947).[9]

This is not to suggest that federal courts have no power to shape federal common-law rules; the Supreme Court has reaffirmed for almost forty years the judiciary's author-

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8. As the majority suggests, a third ground for preferring state law in this case is that the suit is between private parties. The Supreme Court has indicated that, especially when the United States is not a party, a strong conflict is needed to displace state law. *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 31, 97 S.Ct. 2490, 2494, 53 L.Ed.2d 557 (1977); *Bank of America v. Parnell*, 352 U.S. 29, 34, 77 S.Ct. 119, 121, 1 L.Ed.2d 93 (1956). For cases in which federal law was applied when the United States was not a party, however, see *Illinois v. Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972) (federal rule applied in dispute between states over interstate pollution); *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946) (federal rule of equity applied in federal action between private parties). *See also Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979); *J. I. Case v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944); *Sola Electric v. Jefferson Electric*, 317 U.S. 173, 63 S.Ct. 172, 87 L.Ed. 165 (1942). The United States' status as a party, however, certainly does not trigger the automatic generation of a federal rule. *E. g., United States v. Kimbell*, 440 U.S. 715, 99 S.Ct. 1448, 59 L. Ed.2d 711 (1978); *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966); *United States v. Brosnan*, 363 U.S. 237, 80 S.Ct. 1108, 4 L.Ed.2d 1192 (1960).

9. In *Standard Oil*, the Court turned down the opportunity to create a federal rule, but it also rejected use of a state rule. That case is therefore not solid support for a general state law preference, but it does reflect the Court's concern that its rulemaking not infringe on powers best exercised by Congress. *See also* R. Bridwell & R. Whitten, *supra* note 7, at 133-34. These authors also express the concern that judicial rulemaking rarely takes into account the parties' expectations, which causes unfairly retroactive rulemaking, and uncertainty in the law and in private relations. *Id.* at 133. *See* majority opinion, note 17.

ity to fill many of the gaps left by Congress.[10] Nor is it suggested that separation of powers principles would require adoption of state law in the face of a significant conflict between that law and federal directives; under the current framework, the balancing of state and federal interests does not occur until after a determination that state law is not inconsistent with federal goals. Furthermore, I recognize that separation of powers considerations may not carry as much weight for questions such as this one, in which the federal common-law rules have been long evolving without indication of congressional displeasure. It does seem to me, however, that separation of powers principles fortify a general preference for applying a state law rather than creating a federal rule when the weight of federal and state interests is close on balance.[11] If the current frame-

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10. *Cf. Cannon v. University of Chicago*, 441 U.S. 677, 730, 745-47, 99 S.Ct. 1946, 1974, 1982-84, 60 L.Ed.2d 560 (Powell, J., dissenting) (1979) (distinguishing separation of powers problems from choice of law questions). For the view that Congress would be unable to bear the burden of interstitial lawmaking, see Hart, *The Relations Between State and Federal Law*, 54 Colum.L.Rev. 489, 534 (1954). *See also United States v. Little Lake Misere Land Co.*, 412 U.S. at 593, 93 S.Ct. at 2397.

11. The majority states that "the choice of law question in this case is a close one," although federal interests are not "sufficient to overcome [a state law] preference." The question does not appear so close to me. No significant conflict exists that will defeat the purposes of the Federal Power Act. The three articulated federal interests or policies are not unduly hampered by application of state law. Congress itself built into the Act a significant amount of disuniformity. As in *Kimbell*, the federal operations already specifically adapt to state law and involve individual negotiation with landowners, which minimizes the force of Georgia Power's "generalized pleas for uniformity." 440 U.S. at 729-30, 99 S.Ct. at 1459. The Court's statements in *Butner* concerning use of state rules in bankruptcy proceedings have even greater relevance to the Federal Power Act, under which the federal interests are less compelling:

> Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests

(Continued on following page)

work for analyzing choice of law must remain, principles of federalism and separation of powers support favoring state law as the rule of decision.

ALVIN B. RUBIN, Circuit Judge, with whom AINSWORTH, TJOFLAT and FRANK M. JOHNSON, Jr., Circuit Judges, join, dissenting.

Because I fail to perceive any sound reason to distinguish between condemnation proceedings brought by the United States and those in which it authorizes its power to be used by its statutory licensee for a federal public purpose, I respectfully dissent. Federal rules *ex proprio vigore* should apply to such condemnation proceedings for the reasons set forth in the majority opinion in *Georgia Power v. 54.20 Acres of Land,* 563 F.2d 1178 (5th Cir. 1977), *cert. denied,* 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979), and followed in the panel opinion, 596 F.2d 644.

Footnote continued—

> by both State and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy." *Lewis v. Manufacturers National Bank,* 364 U.S. 603, 609, 81 S.Ct. 347, 350, 5 L.Ed.2d 323.

440 U.S. at 55, 99 S.Ct. at 918. Under these circumstances, the state interests outweigh the federal, regardless of whether a general presumption favoring state law is utilized.

GEORGIA POWER COMPANY,
Plaintiff-Appellee,

v.

138.30 ACRES OF LAND, situate, lying and being in Land Lot 327 of the 3rd Land District 389th G. M. District, Putnam County, Georgia, Defendants,

Mildred B. SANDERS, a/k/a Mrs. Karl D. Sanders, Jr., et al.,
Defendants-Appellants.

GEORGIA POWER COMPANY,
Plaintiff-Appellee,

v.

377.61 ACRES OF LAND, situate, lying and being in Land Lots 367, 368, 369, 377, 378, 379, 380, 381, 382 and 383 of the Third Land District, 389th G. M. District, Putnam County, Georgia, Defendants,

Mrs. Nellie W. Larman et al.,
Defendants-Appellants.

GEORGIA POWER COMPANY,
Plaintiff-Appellee,

v.

532.82 ACRES OF LAND, situate, lying and being in the 145th G. M. District, Greene County, Georgia, Defendants,

Clifford H. Dyar, Jr., et al.,
Defendants-Appellants.

Nos. 77-1775 to 77-1777.

United States Court of Appeals,
Fifth Circuit.

June 6, 1979.

Appeals from the United States District Court for the Middle District of Georgia.

Before MORGAN, FAY and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The owners of three properties were required to render unto the sovereign portions of their land for the Lake Wallace hydroelectric project in Georgia; they protest that they did not receive in return their constitutional due, and appeal from commission determinations of just compensation for the property taken. The owners, we conclude, were not constitutionally guaranteed a jury trial; the district court acted within the range of its discretion in appointing a commission; and the commission properly applied federal rather than state law in determining the amount of compensation. However, the commission made clear errors in, or failed adequately to explain the basis for, its conclusions determining the amount of compensation due each of the owners. Therefore, the judgments of the district court approving the reports are vacated, and the cases remanded for further proceedings consistent with this opinion.

I. *Right to a Jury Trial*

[1] The landowners assert that their right to just compensation includes the right to have the amount of compensation fixed by a jury, and urge that the Supreme Court has never squarely denied the right to a jury trial on the issue of just compensation in an eminent domain action brought by the United States. The premises of the appellants' argument are mistaken.

In ruling on a challenge to a jury determination of the scope of a condemnation project, the Supreme Court recently said, "it has long been settled that there is no con-

stitutional right to a jury in eminent domain proceedings." *United States v. Reynolds,* 1970, 397 U.S. 14, 18, 90 S.Ct. 803, 806, 25 L.Ed.2d 12, 17 (denial of jury trial on issue of project's scope). That case did not directly present the issue of the right to have the amount of compensation determined by a jury, but the Court's determination that no constitutional issue was presented is consistent with prior decisions in which it has implicitly held or stated in dicta that there is no right to a jury trial in condemnation proceedings. *See, e. g., Bauman v. Ross,* 1897, 167 U.S. 548, 591, 17 S.Ct. 966, 983, 42 L.Ed. 270, 289; *Long Island Water-Supply Co. v. Brooklyn,* 1897, 166 U.S. 685, 694, 17 S.Ct. 718, 722, 41 L.Ed. 1165, 1168; *United States v. Jones,* 1883, 109 U.S. 513, 519, 3 S.Ct. 346, 350, 27 L.Ed. 1015, 1017; *Curtiss v. Georgetown and Alexandria Turnpike Co.,* 1810, 10 U.S. (6 Cranch) 233, 3 L.Ed. 209. *See also* 12 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 3051 at 120 (1973); 5 Moore's Federal Practice ¶38.32[1] at 240-49 (2d ed. 1978). In promulgating subdivision (h) of Rule 71A of the Federal Rules of Civil Procedure, the Supreme Court also expressly approved use of a commission to determine just compensation in certain cases.

[2] The Fourth Circuit has, apparently, reconsidered *Beatty v. United States,* 4 Cir. 1913, 203 F. 620, *dismissed for want of jurisdiction and cert. denied,* 1914, 232 U.S. 463, 34 S.Ct. 392, 58 L.Ed. 686, which recognized the right to a jury trial. *See United States v. 21.54 Acres of Land,* 4 Cir. 1973, 491 F.2d 301, 304; *Atlantic Seaboard Corporation v. Van Sterkenburg,* 4 Cir. 1963, 318 F.2d 455, 459; *United States v. Cunningham,* 4 Cir., 246 F.2d 330, 332. For example, in *21.54 Acres of Land, supra,* 491 F.2d at 304, the court noted that a landowner is not entitled to a jury trial if the trial judge determines that valuation should be by a commission or if Congress establishes a tri-

bunal to determine the amount of compensation due. *See* 40 U.S.C. § 258a; Fed.R.Civ.P. 71A(h). If there were a constitutional right to a jury trial on just compensation, the judiciary and Congress would have no power to deny landowners a jury trial.

II. *Discretion to Appoint a Commission.*

[3] The landowners contend that it was an abuse of discretion for the court to appoint a commission in their cases because only a small amount of property possessing unique characteristics was involved, a jury trial would not have occasioned them hardship, and a jury would have been more sympathetic than a commission to small landowners. Yet it was precisely because the Supreme Court considered use of a commission to be more equitable to small property owners that it authorized commission appointment.

Subdivision (h) of Rule 71A of the Federal Rules of Civil Procedure gives the court discretion, "because of the character, location, or quantity of property to be condemned, or for other reasons in the interest of justice," to order the use of a commission to determine the compensation due. The advisory committee that formulated the present rule had previously proposed a rule requiring a jury trial on the issue of just compensation in all cases except when existing statutes provided to the contrary.[1] The Supreme Court directed the committee to reconsider in view of assertions that: (1) a provision for jury trial would be unfair in the case of many small landowners who lived at distances remote from the place where court would be held; (2) such a trial would be expensive and

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1. There were statutory exceptions for TVA cases and cases arising in the District of Columbia, *See* 12 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 3051 at 119-20; 5 Moore's Federal Practice ¶ 38.22[2] at 250.1-52.

burdensome to them; and (3) commissions are less likely than juries to make disproportionate awards when the government is condemning great acreages. *See generally* 12 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 3051; 5 Moore's Federal Practice ¶ 38.32[2].

In presenting its revised proposal, now subdivision (h), the Advisory Committee noted that the reason justifying use of a commission for TVA cases "applied not only to the TVA but to other large governmental projects, such as . . . hydroelectric power . . . national forests, and others." Supplementary Report to the Court of the Advisory Committee, March 1951, *reprinted in* 7 Moore's Federal Practice ¶ 71A.06[2] at 71A-172. The Committee further noted that the rule as drafted met the Court's concerns: "[i]n large projects like the TVA the court may decide to use a commission." *Id.* at 71A-173.

The Lake Wallace project embraces 21,215 acres, composed of 225 tracts held by 197 different owners. The property taken is located in five counties, all of which are some distances from where the district court sits. At the time these cases were commenced, it was estimated by Georgia Power Company's land department manager that it would be necessary to file about 40 condemnation cases to acquire the property; coincidentally, 40 cases had been brought by the time this appeal was briefed. The district court noted each of these factors in denying a jury trial.

Our prior cases applying Rule 71A support the district court's decision. Although we have previously stressed that a commission is to be used only for exceptional reasons, *see United States v. Leavell & Ponder, Inc.*, 5 Cir. 1961, 286 F.2d 398, 407-08, *cert. denied*, 366 U.S. 944, 81 S.Ct. 1674, 6 L.Ed.2d 855 and *United States v. Buhler*, 5 Cir. 1958, 254 F.2d 876, 880, we have recognized that Rule 71A(h)

permits denial of a jury trial and appointment of a commission in cases involving "large areas held by many small landowners, or property too distant for a jury to view the premises . . . ." *Id.* We have also upheld the use of a commission in a project involving only sixteen parcels of land. *United States v. 2,477.79 Acres of Land*, 5 Cir. 1958, 259 F.2d 23.

[4, 5] The fact that the property of the particular landowners involved in these cases was small and possessed unique characteristics, or that the landowners desired a jury trial, is not controlling; the rule focuses on the character, location or quantity of the entire property being condemned, hence on the overall scope of the project. *See Buhler, supra*, 254 F.2d at 880. A tremendous undertaking may embrace particular tracts of small size whose appraisal is relatively easy. The commission is appointed for the entire project, not simply for specific parcels whose value is difficult to determine. If, indeed, these properties are so singular as to require complex analysis, that factor would weigh in favor of, rather than against, the appointment of a commission. *See Leavell & Ponder, supra*, 286 F.2d at 408-09; *United States v. Cunningham*, 4 Cir. 1957, 246 F.2d 330, 333.

III. *Applicability of Federal Law.*

[6-8] Although the constitution requires the payment of just compensation when private property is taken for a public purpose, whether the taking is by federal or state authority, different standards for determining just compensation may be established by state and federal laws. *See Grand River Dam Authority v. Grand-Hydro*, 1948, 335 U.S. 359, 69 S.Ct. 114, 93 L.Ed. 64. Under federal common law, which was applied by the commission, just compensation is calculated by subtracting the project's benefit

to the land retained from the value of the land taken. Under Georgia law, consequential benefits to the land retained by the condemnee are not offset against the value of the land taken in determining just compensation. Because each of the owners retained land that was benefitted by the project, if compensation had been determined under state law rather than federal law, each would have been entitled to more compensation.

[9] However we have now resolved the issue by holding that federal law should be applied when a licensee of the Federal Power Commission exercises the power of eminent domain in federal court as authorized by Section 21 of the Federal Power Act, 16 U.S.C. § 814 (1970). *Georgia Power Company v. 54.20 Acres of Land,* 5 Cir. 1977, 563 F.2d 1178, *cert. denied,* 1979, ... U.S. ....., 99 S.Ct. 1213, 59 L.Ed.2d 454.

IV. *Alleged Errors in the Commission's Final Report.*

We turn, then, to the commission's report with respect to each of the properties. This necessarily involves a discussion of the characteristics of each property in some detail. However, we set forth, at the outset, the principles that apply to the reports of such commissions.

[10-12] Commissions are not juries, whose general verdicts are favored by a presumption of regularity if substantial evidence supports their result. *See Mortensen v. United States,* 1944, 322 U.S. 369, 374, 64 S.Ct. 1037, 1040, 88 L.Ed. 1331; *Sulmeyer v. Coca Cola Company,* 5 Cir. 1975, 515 F.2d 835, 845, *cert. denied,* 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341; *Boeing Company v. Shipman,* 5 Cir. en banc 1969, 411 F.2d 365, 374, 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2524. When a commission is used in place of a jury to determine the compensation for a taking "[c]onclusory findings are alone not sufficient,"

because findings by a commission are to "be accepted by the court 'unless clearly erroneous'; and conclusory findings as made in these cases are normally not reviewable by that standard." *United States v. Merz,* 1964, 376 U.S. 192, 198, 84 S.Ct. 639, 643, 11 L.Ed.2d 629, 634. "[A] hearing before a commission must result in findings much more detailed than a general verdict." *United States v. 2,872.88 Acres of Land,* 5 Cir. 1962, 310 F.2d 775, 777, *modified* in *Merz, supra. See Cunningham, supra,* 246 F.2d at 333. The path followed by the commission in reaching the amount of the award shall be distinctly marked, *United States v. Merz, supra,* 376 U.S. at 199, 84 S.Ct. at 643, 11 L.Ed.2d at 634, if not blazed with an array of findings of subsidiary facts that demonstrate that the ultimate finding is soundly and legally based. *2,872.88 Acres of Land, supra,* 310 F.2d at 779.

We recently reversed the decision of a district court accepting a commission's report that failed to explain why the commission had rejected certain sales as comparables; the case was remanded for findings that would give us "a basis for enlightened appellate review." *United States v. Trout,* 5 Cir. 1967, 386 F.2d 216, 224. While the commission's path in these cases may have been better marked than the trail in *Trout*, certain of its findings were, nevertheless, either clearly erroneous or insufficient to provide a basis for "enlightened" review. Therefore we remand the cases for further proceedings related to some of the points discussed below.

Sanders Taking

[13] After the taking of 138.30 acres by Georgia Power Co., the landowners are left with three separate parcels consisting of 4.79, 21.20 and 41.03 acres. The smallest parcel has direct highway access, but the other two do not. The 21.20 acre parcel has been cut off from the state highway

by the reservoir; after the taking, the only remaining access to this parcel is over a small, unpaved road that grazes the eastern corner of the property. In order partially to remedy this problem, Georgia Power Co., prior to the commission's hearing, gratuitously granted to the landowners an unimproved 80-foot easement that allows direct access to a county road. By its terms, however, the easement expires "upon nonuse for 24 consecutive months, or no maintenance for 12 months . . . ."

The 41.03 acre parcel was deprived of access to a state highway by the taking of 10 acres in the western corner of the original tract. The district court's final order reserves to the landowners, "a 50-foot, non-exclusive road right-of-way" along the southwestern boundary of the 10 acres taken, which will give this parcel access to the highway. However the topography of the area makes it difficult to construct a road, and drainage from an adjoining tract may create maintenance problems. International Paper Company owns the fee simple interest over which the easement runs;[2] if a road is constructed, the users must maintain it or they must bear the expense of constructing a paved surface. Even in that event, the county may refuse to accept dedication because the road is on property owned in fee by International Paper Company.

In its amended report, the commission found that the provision made for road purposes with respect to the 21.20 acre tract was "so nearly adequate" as not to affect adversely the fair market value of the tract. It found that giving the 41.03 acre tract a value of $1100 per acre "includes the cost of any road." The commission allowed no additional compensation for the construction of a road to this tract because "[n]one of the comparables cited by the

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2. Georgia Power Co. obtained from International Paper Co. the easement that was granted to Sanders.

witnesses for the landowner or the Power Company included an item for road construction." In reaching these conclusions, the commission did not adequately compensate the owners for the access problems created for these two parcels, and, therefore its findings as to their values are clearly erroneous.

[14, 15] A simple easement over unimproved fields that will expire "upon no use for 24 consecutive months, or no maintenance for 12 months," is clearly less valuable to the property owned than either a public road or a permanent easement. If the owner is unable for any reason to build a road over the easement within 24 months, or if, thereafter, the owner is unable to maintain it, it will be lost.[3] Moreover, even if the easement is utilized, the landowner must bear both the cost of construction and the continuing expense of maintenance. Each of the expert witnesses who testified concerning the value of the remaining 21.20 acre tract believed that the limited easement added to the value of the property and based his estimate of value on what the property would be worth if a road were constructed. Two of them calculated the current value of the parcel by estimating the value of the tract with road access, then deducting the cost of constructing a road and an additional amount to account for the risk of losing the easement. One estimated that the value of the tract should be reduced by 25 percent simply to account for the limited nature of the easement; another, a witness for Georgia Power, made a 20 percent reduction for the same reason. A third expert, who did not specifically make a deduction to account for the limited nature of the easement, nevertheless admitted that such an easement is less valuable

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3. International Paper Co. has explained, in a letter to Georgia Power Co., that the intent of the parties to the easement was that the 24 month and 12 month limitation periods shall commence when filling of the Wallace Dam Reservoir begins, or, at the latest, on the scheduled filling date of January 1, 1979.

than a permanent one. The commission relied on these experts' other opinions in connection with this parcel, but ignored their testimony concerning the effect of the limited easement. Because all of the experts agreed that the restricted nature of the easement had a detrimental effect on value, and two of the three expressly stated that some allowance should be made for it, the failure of the commission to do so was clearly erroneous.

The commission assumed that the cost of building a road over the right-of-way affected the value of the 41.03 acre parcel, but in allowing only $1100 an acre for the property with some vague allowance for this expense, it included far less than the estimated $10,000 cost of a paved road. If the commission assumed that a less expensive road would be built that could not be dedicated to the county, it made no specific allowance for maintenance expense, and the language of its report suggests that none was tacitly included. Its failure to take adequately into account the effect of these costs on the parcel's value was clearly erroneous.

Larman Taking

The Larman taking was on October 29, 1974. Sales of other properties prior to that date were used by the commission as comparables for the purpose of estimating the value of the Larman property; some of these comparables were used to estimate its pre-taking value, while the others were used to estimate its post-taking value. The use of different comparables apparently was based on the assumption that the character of the property was changed by the taking and, therefore, other comparables then became appropriate. The prices of these comparable properties were adjusted to account for the amount of time that had elapsed between the time of sale and the time of the Larman taking, and the market conditions prevailing during this

period. Mrs. Larman alleges that the commission was inconsistent in its adjustments and that, had it followed its own standards, it would have awarded her more compensation. In particular, she asserts that the commission improperly failed to adjust for inflation one of the comparable sales used to establish the value of the Larman property before the taking while it made such adjustments in assessing other comparable sales that had occurred about the same time and that were used to establish pre- and post-taking values.

One expert witness testified that property in the area of the Larman property appreciated about 25 percent during 1973, but that, beginning in 1974, the market leveled off. This expert thought that the appreciation rate was a little higher, approximately 35 percent, during 1973 for property that would remain after the project was completed or that was purchased because of speculation prompted by the project. This testimony clearly supports the commission's adjustment of several of the comparable sales that occurred more than two months prior to the end of 1973.

The following table shows the increases that the commission made in the sale price per acre of the comparable sales to account for the inflation after they occurred:

Date of sale	Sale used as comparable for determining value before or after taking	Sale price (per acre)	Commission's adjustment (price/ acre)	Percentage adjustment
1/73	Before	$550	0	0
2/73	After	$825	+$288	34.9%
3/73	After	$974	+$87	8.9%
6/73	Before	$365	+$86	23.6%
*11/73 or post 1973	Used for both purposes	Varied	0	0

*Remaining sales

[16] We have great difficulty in comprehending what the commission did and why. For example, in establishing the value of the property before the taking, an adjustment was made in the June 1973 sale, but none in the January 1973 sale. The reason for this apparent inconsistency is not explained. In effect, the commission apparently assumed, without adequate explanation of its rationale, that without the project the value of the property sold in January would have been unchanged from that time through October 1974. Yet an expert who testified regarding the inflation rate during 1973 stated that he would add 25 percent to the sale price of that property to adjust for inflation since the time it was sold. The failure either to make such an adjustment or to account adequately for the failure to do so makes the report unacceptable.

When we examine the comparables used to value the residual property after the taking, we find other unexplained adjustments or failures to adjust. The March sale was adjusted upward less than 10 percent for timing. The sale price of the comparable property sold a month before was adjusted upward by almost 35 percent, which is more in line with what the expert testimony indicated is appropriate. At least on the surface, the handling of the March 1973 comparable appears to be an error in Mrs. Larman's favor, for it appears that a greater upward adjustment in the sale price of this property should have been made.

Dyar Taking

A. *Shallow water*

[17] Once the reservoir is filled, the property retained by the landowners will have an extensive shoreline. The water in this part of the lake will be extremely shallow. Moreover, the level of the water in the lake will

rise and fall daily because Lake Wallace will be a pump-storage facility. This variation in the water's depth, coupled with the shallowness of the reservoir in the area of Dyar's property, will cause a substantial daily movement of its shoreline. In the southern portion, it will move in and out up to 200 feet horizontally each day; consequently, vast mudflats will often be exposed.

Expert witnesses for both parties testified that the portion of the Dyar property with shallow water will be less valuable than the portion with deeper water. One witness estimated that the value of this property will be one-third less than if it had deeper water. The commission, however, made no specific allowance for this factor. It explained its failure to do so on the basis that it relied exclusively "on adjusted comparable sales."

In valuing the property retained after the taking, the commission cited the conclusions of the experts who testified, but did not itself adjust the sales these experts cited as being comparable. All of these experts clearly took the shallow water into account in their testimony. For purposes of comparison with the retained Dyar property, two of them adjusted downward the sales prices of those properties they considered comparable having water depth superior to that of the Dyar property. In addition, they included a comparable property that has even shallower water than the Dyar property will have, and adjusted its sale price upward to account for this factor. Based on his analysis of the adjusted comparables he had selected, one of these two experts concluded that the remaining Dyar property was worth $900 per acre. The other concluded that it was worth $850 per acre. The third expert, who testified for the landowners, neither considered any sales involving property with water shallower than that on the Dyar property, nor adjusted each comparable separately for this factor; in order to take it into

account, however, he reduced by one-third the estimated value he obtained based on the comparables he considered. He also included a discount factor for "holding time" until the lake is ready for use. The commission considered this to be improper, and, therefore revised his figure of $668 per acre to $813 per acre.

The commission concluded that the remaining Dyar property is worth $850 per acre, which is less than or equal to the value given by two of the experts even after taking the shallow water into account. The commission would have arrived at a higher value for the property than it did if it had not accepted the adjustments these experts made to take into account the shallow water. Its reliance on the testimony of the experts regarding the influence of this factor, rather than attempting to make its own specific adjustments to each comparable sale to take it into account, was not clearly erroneous.

B. *Sales the commission rejected as comparable*

The commission rejected three sales that the landowners' expert testified involved property comparable to the Dyar property. The owners assert that the commission did not adequately explain its basis for rejecting these sales.

[18] The Dyar tract was a functioning farm unit. This gave it a higher value than unused fields. Only one of the sales accepted as comparable by the commission involved property employed as a functioning farm unit; yet, each of the properties involved in the three sales that the commission rejected as comparables was so utilized. The commission rejected one of them because it was an "industrial sale"; the property had been sold to a company for development of a fertilizer processing plant. The other two sales the commission refused to consider were

dismissed with the conclusory statement that they "were not of sufficient comparability to use."

[19] The commission's refusal to consider the "industrial sale" was reasonable. However, no basis for its refusal to treat the other two sales as comparable is shown in the record. In fact, when the landowners' expert testified regarding these two sales, the commission indicated that it would view them as comparables.

These two sales were at prices of $750 per acre and $733 per acre, considerably higher than the prices of the other properties considered by the commission. Had these sales been considered, Dyar's compensation would have been greater. The commission's failure to adequately explain its refusal to consider these sales as comparables makes its report unacceptable.

C. *Adjustment for pasture*

Before the taking, the Dyar property consisted, in part, of open land or pasture land and, in part, of timber land. The commission considered sales of different properties in order to value each of these components of the Dyar property. In order to value the open land or pasture land, the commission considered sales of three properties that it considered comparable. The prices of each of these properties was adjusted to take into account differences between it and the Dyar property. With the adjustments made by the commission, the prices of these comparables were $459, $468 and $500; based on this evidence, the commission valued the Dyar pasture land at $485 per acre.

[20] The owners assert that a 10 percent downward adjustment made by the commission to account for "pasture" in the price of one of the comparables, a sale by Barksdale to Beauchamp, is clearly erroneous. The commission gave no justification for this adjustment. The

reason for it is not self-evident, although the record suggests at least one possible explanation.[4] We are unable, however, to determine from the record what the commission's rationale actually was. The landowner was entitled to an explanation that would permit us intelligently to review it. *See United States v. Trout, supra.* Further findings should have been made by the commission.

Conclusion

For the reasons set forth above, further fact-findings and, in light thereof, reevaluation of the compensation awarded each of these landowners are required. Accordingly, the judgments of the district court in these cases are VACATED, and the cases are REMANDED for further proceedings consistent with this opinion.

VACATED and REMANDED.

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4. One of the experts who testified regarding the Barksdale sale testified that he believed this was a speculative sale. The commission may well have believed that the sale price was somewhat more than a buyer would pay simply for land to use for pasture. The 10 percent reduction in this sale price, therefore, may be attributable to the commission's taking this factor into account.

GEORGIA POWER COMPANY,
Plaintiff-Appellee,

v.

54.20 ACRES OF LAND, situated lying and being LAND LOTS 315 AND 326 OF the 3RD LAND DISTRICT, etc., et al.,
Defendants,

Jim Dodson and Patricia W. Womack,
Defendants-Appellants.

J. C. HILSMAN, et al.,
Plaintiffs-Appellants,

v.

GEORGIA POWER COMPANY,
Defendant-Appellee.

Nos. 75-4448 and 77-1327.

United States Court of Appeals,
Fifth Circuit.

Nov. 28, 1977.

Appeals from the United States District Court for the Middle District of Georgia.

Before WISDOM, SIMPSON, and TJOFLAT, Circuit Judges.

WISDOM, Circuit Judge:

These condemnation cases present the issue whether compensation should be determined under federal law or under the law of the state where the condemned property is located when a licensee of the Federal Power Commission exercises the power of eminent domain in federal court as authorized by Section 21 of the Federal Power

Act, 16 U.S.C. § 814 (1970). We reserved this question in *Louisiana v. Lindsey*, 5 Cir. 1975, 524 F.2d 934, as did the Supreme Court in *Grand River Dam Authority v. Grand-Hydro, Inc.*, 1948, 335 U.S. 359, 69 S.Ct. 114, 93 L.Ed. 64. We now hold that federal law controls.

I.

The plaintiff-appellee, Georgia Power Company, is a privately owned Georgia utility. It intends to operate a hydroelectric power generating facility with a dam across the Oconee River in Hancock and Putnam Counties, Georgia, at a point known as Laurens Shoals. The dam will produce a lake to be known as Lake Wallace. The appellants are Georgia landowners with property which will be inundated by Lake Wallace.[1]

Under the Federal Power Act, 16 U.S.C. §§ 791a, et seq. (1970), the Federal Power Commission may issue licenses to certain persons or entities to construct, operate, or maintain various hydroelectric generating facilities. 16 U.S.C. § 797(e). The F.P.C. issued a license to Georgia Power on August 6, 1969, for the Lake Wallace Project.[2] As a licensee, Georgia Power may exercise the right of eminent domain under Section 21 of the Federal Power Act, 16 U.S.C. § 814 (1970), which provides:

> When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or

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1. The numerous appellants in this consolidated appeal fell into three groups for briefing purposes. In addition, Mrs. Nellie W. Larman, another landowner involved in a Lake Wallace condemnation proceeding, filed an amicus brief. Because each appellant's argument, if successful, would benefit the appellants as a group, we generally have not identified the particular party advancing an argument discussed in this opinion.

2. 42 F.P.C. 356 (1969). At that time, the project was known as the Laurens Shoals Project and the license is issued in that name.

> damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto . . . it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Exercising this right, Georgia Power brought actions in the District Court for the Middle District of Georgia. Senior Judge W. A. Bootle appointed a three-member Commission, *see* Fed.R.Civ.Proc. 71A, to determine the amount of compensation due the condemnees. In his instructions to the Commissioners, Judge Bootle set out the federal law of compensation. These rules differ from Georgia law. Instruction No. 20 directs the Commissioners to ignore an increase in value which the Georgia Power project has created in the condemned property; a Georgia court might recognize such value. *See Hard v. Housing Authority,* Ga. 1963, 219 Ga. 74, 132 S.E.2d 25. Instruction No. 21 allows the Commissioners to offset any recovery for land actually taken with benefits to any remaining property caused by the project; Georgia law prohibits such a set-off. *See* Ga.Code Ann. § 36-504 (1970). The district court declined to instruct the Commissioners to include a reasonable attorney's fee in their award; in a Georgia proceeding a reasonable attorneys' fee would be allowed. *See White*

v. Georgia Power Company, Ga.1976, 237 Ga. 341, 227 S.E. 2d 385.

After these instructions were first made in 1975 several condemnees in cases other than No. 75-4448 filed motions and objections opposing the use of federal law. The district court held a pre-trial hearing on the objections. Judge Bootle made several changes in the phrasing of his instructions, but he regarded federal laws as controlling.[3] The Commission then heard evidence in No. 75-4448. Its report concluded that the benefits accruing to the land remaining with the landowners exceeded the value of the property taken. As a result, the Commission awarded no monetary compensation. The landowners opposed Georgia Power's motion to confirm the report on the ground that the offset of benefits was improper. The court overruled these objections and the condemnees appealed.[4]

No. 77-1327 began after Judge Bootle's decision in No. 75-4448 to apply federal law. The condemnees in No. 77-1327 nevertheless moved that the court incorporate Georgia law into its instructions.[5] The judge conducted a pre-trial conference and heard argument on the question. He then denied the motion and adhered to his previous order that

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3. After the hearing, Judge Bootle provided a Memorandum to Counsel citing cases supporting his conclusion that federal law of compensation applies. Those cases are *Clearfield Trust Co. v. United States*, 1943, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed 838; *United States v. County of Allegheny*, 1944, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209; *United States v. Standard Oil Co.*, 1947, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067; *United States v. Yazell*, 1966, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404; *Duvall-Wheeler Livestock v. United States*, 5 Cir. 1969, 415 F.2d 226; *United States v. McCleskey Mills, Inc.*, 5 Cir. 1969, 409 F.2d 1216.

4. During the condemnation proceedings of 75-4448 the appellant Jim Dodson conveyed his interest in the condemned property to Patricia Womack. On March 21, 1975 Judge Bootle granted Georgia Power's motion to add Patricia Womack as a defendant.

5. The composition of the Commission and the Instructions given to the Commissioners are the same in both cases before us.

federal law applies. Judge Bootle certified the question for immediate review under 28 U.S.C. § 1292(b) (1970). This Court allowed the appeal, and consolidated it with No. 75-4448.

II.

Before a federal court may reach the question of applying state or federal common law to an issue before it, the court must determine that the source of the right or authority in question is federal. If the source is not federal, *Erie Railroad Co. v. Tompkins,* 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, and the Rules of Decision Act[6] direct that state law apply of its own force. Even if the source is federal, the court must follow any congressional directions about the proper law to apply. *See* Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test,* 43 U.Chi.L.Rev. 823, 826 (1976).

We find that the source of the power to condemn property contained in Section 21 is federal. Eminent domain inheres in sovereignty. *See Kohl v. United States,* 1876, 91 U.S. 367, 23 L.Ed. 449. Within our federal system the states and the federal government exercise independent powers of eminent domain, and neither can delegate the use of the other's authority. 91 U.S. at 372-73, 23 L.Ed. 449; *Latinette v. City of St. Louis,* 7 Cir. 1912, 201 F. 676, 678. Thus, when Congress provided that licensees could exercise "the" power of eminent domain, it was referring to the federal power. Both courts and commentators have described the eminent domain power delegated in Section

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6. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652 (1970).

21 as the federal power. *Federal Power Commission v. Tuscarora Indian Nation,* 1960, 362 U.S. 99, 120, 80 S.Ct. 543, 4 L.Ed.2d 584; *City of Tacoma v. Taxpayers of Tacoma,* 1958, 357 U.S. 320, 340, 78 S.Ct. 1209, 2 L.Ed.2d 1345; *Chapman v. Public Utility District No. 1,* 9 Cir. 1966, 367 F.2d 163, 167; 7 *Moore's Federal Practice* ¶ 71A.10[2]. When it condemns land under Section 21, a licensee acts as the agent of the United States government. *Tuscarora Nation of Indians v. Power Authority,* 2 Cir. 1958, 257 F.2d 885, 894, *vacated as moot sub nom., McMorran v. Tuscarora Nation of Indians,* 362 U.S. 608, 80 S.Ct. 960, 4 L.Ed.2d 1009. This delegation of federal power is constitutional. *Missouri v. Union Electric Light & Power Co.,* C.D.Mo.1930, 42 F.2d 692; *see Thatcher v. Tennessee Gas Transmission Co.,* 5 Cir. 1950, 180 F.2d 644, *cert. denied,* 340 U.S. 829, 71 S.Ct. 66, 95 L.Ed. 609 (upholding identical delegation in the Natural Gas Act, 15 U.S.C. § 717(b) (1970)).

Appellants argue that Section 21 does not delegate federal authority, but merely provides a federal forum for exercise of a state created eminent domain power. Such an interpretation does not accord with decisions upholding the right of a licensee to condemn property that it could not obtain under the applicable state statute. *E. g., City of Tacoma v. Taxpayers of Tacoma,* 1958, 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345; *First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 1946, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143. There is no suggestion in the statute that Congress intended to create an interstitial power of eminent domain that would function only when state powers were inadequate. In contrast, Section 19, 16 U.S.C. § 812 (1970) expressly limits the FPC's authority to regulate rates to situations where a state does not have its own regulations Section 20, 16 U.S.C. § 813 (1970) places similar limits on other powers of regulation.

We are not persuaded by the argument that the $3,000 in controversy requirement shows that Section 21 is a jurisdictional provision. It is true that this requirement parallels the amount in controversy requirement for diversity cases at the time the Federal Power Act was enacted. Congress, however, added the $3,000 requirement late in the consideration of the Federal Power Act. *Compare* H.R.Rep.No.715, 65th Cong., 2d Sess. 27, H.R.Rep. No.1147, 65th Cong., 3d Sess. 13, *and* H.R.Rep.No.61, 66th Cong., 1st Sess. 10 (original versions without the $3,000 amount in controversy requirement) *with* S.Rep.No.180, 66th Cong., 1st Sess. 9 and 16 U.S.C. § 814 (1970) (versions containing $3,000 amount in controversy requirement as added on the House floor). As a result, the requirement cannot be read as an indication of the original purpose of Section 21. Members of Congress do not seem to have believed the amount in controversy amendment significantly changed Section 21; the Senate and Conference Committee Reports, written after the House adoption of the amendment, do not mention it. Further, the House debates establish that the amount in controversy minimum was designed to prevent inconvenience to a landowner who might otherwise need to travel several hundred miles to press a small compensation claim. 58 Cong.Rec. 2240 (1919) (remarks of Mr. Stevenson).

We have not found any congressional directive to apply state law in either the language of Section 21 or its legislative history. Therefore, the second prerequisite to our consideration of the choice of law issue is met. The language in the statute referring to state "practice and procedure" does not govern the choice between substantive rules of compensation. The Supreme Court has held that such language "[does] not, and could not, affect questions of substantive right—such as the measure of compensation —grounded upon the Constitution of the United States". *United States v. Miller*, 1943, 317 U.S. 369, 380, 63 S.Ct. 276,

283, 87 L.Ed. 336. *Accord United States v. 93.970 Acres of Land,* 1959, 360 U.S. 328, 79 S.Ct. 1193, 3 L.Ed.2d 1275. The appellants attempt to distinguish *Miller* on the ground that the plaintiff was the United States rather than a private licensee. We cannot see why in this context the identity of the plaintiff would change the meaning of virtually identical language.[7] And insofar as Section 21 did require con-

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7. The *Miller* opinion specifically interpreted the following statutes:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

40 U.S.C.A. § 257.

> The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such [district court is] held, any rule of the court to the contrary notwithstanding.

Act of Aug. 1, 1888, c. 728 § 2, 25 Stat. 357. This section was codified, as amended, at 40 U.S.C. § 258 until it was superceded by Rule 71A of the Federal Rules of Civil Procedure.

> The Secretary of the Army may cause proceedings to be instituted, in the name of the United States in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided, however,* That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of the Army, shall be reasonable, he may purchase the same at such price without further delay: *And provided further,* That the Secretary of the Army is authorized to accept donations of land or materials required for the maintenance or prosecution of such works.

33 U.S.C.A. § 591.

formity with state practice, it has been superseded by Rule 71A of the Federal Rules of Civil Procedure. *United States v. 93.970 Acres of Land,* 1959, 360 U.S. 328, 79 S.Ct. 1193, 3 L.Ed.2d 1275; 7 *Moore's Federal Practice* ¶ 71A.10[2] at 71A-252 (2d ed. 1975).

There is little discussion of Section 21 in the Committee Reports or the congressional debates, and none of it illuminates the choice of law issue. Appellants argue, however, that other sections of the statute, such as Sections 19 and 20, evidence a congressional respect for state law which includes state rules of compensation in an eminent domain proceeding. We are not ready to make this inference from unrelated provisions in the Federal Power Act without more support in the legislative materials. The legislative history reveals that Congress took care to preserve state rights in the regulation of power and property to forestall a constitutional attack on the Federal Power Act. *See, e. g., First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 328 U.S. at 174, 66 S.Ct. 906. As a result, the Federal Power Act contains many explicit acknowledgements of state authority. *See, e. g., Id.* at 174 n. 19, 66 S.Ct. 906; Sections 4(a) and (c)[8] (requires cooperation between the FPC and the executive departments and other agencies of the state and federal governments on specified subject); 4(f)[9] (requires notice of application for a preliminary permit to be given to any state or municipality likely to be interested); 7(a)[10] (gives preference in issuing permits and licenses to states and municipalities); 10(e)[11] (provides that certain licenses to states and municipalities be issued and enjoyed without charge); 14[12] (gives states

8. 16 U.S.C. § 797(a) and (c) (1970).
9. 16 U.S.C. § 797(f) (1970).
10. 16 U.S.C. § 800(a) (1970).
11. 16 U.S.C. § 803(e) (1970).
12. 16 U.S.C. § 807 (1970).

or municipalities as well as federal government an option to acquire a licensed project); 19;[13] 20;[14] and 27[15] (a "saving" clause concerning state laws relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein). The failure to mention specifically state laws of eminent domain contrasts with these provisions, and suggests, if anything, that Congress did not believe it necessary to follow state eminent domain rules or desire courts to do so.[16]

The Committee Reports reveal that some members had concerns over the constitutionality of Section 21, although it is not clear whether they thought it an improper invasion of state prerogatives or an improper delegation of federal authority to private parties. H.R.Rep. No.61, 66th Cong., 1st Sess. 10. At any rate, a majority

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13. 16 U.S.C. § 812 (1970).

14. 16 U.S.C. § 813 (1970).

15. 16 U.S.C. § 821 (1970).

16. The dissent makes much of the fact that Congress did not assure "application of a uniform, federal standard in any exercise of eminent domain power, *state* or federal, to acquire land on which to build these federally regulated facilities". (Emphasis changed.) This omission becomes much less telling when one realizes that it is not certain that Congress had the power to compel such uniformity.

Congress could not have simply passed a statute instructing the states to apply federal rules of compensation whenever a licensee chose to exercise a state-granted power of eminent domain to take property for a licensed project. As Justice Brandeis stated in *Erie*: "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts". 304 U.S. at 78, 58 S.Ct. at 822.

Nor could Congress have passed a law forbidding a state from delegating state eminent domain power to a federal licensee. A state has exclusive control over its power of eminent domain. *Kohl v. United States*, 91 U.S. at 372-73, 23 L.Ed. 449. Just as the federal government could not force the states to grant licensees the use of state eminent domain power, it could not force them not to make the grant.

expressed belief that the provision was constitutional and appropriate, without any indication that such a conclusion would be possible only if federal courts applied state law in Section 21 cases. *Id.*[17]

The appellants also argue that Congress endorsed the use of state compensation law when it enacted a provision substantially identical to Section 21 in the Natural Gas Act, 15 U.S.C. § 717f(h) (1970), without commenting adversely on certain cases appellants read to mandate adoption of state law for all substantive issues arising in a Section 21 lawsuit. In a similar vein, the appellants urge us to follow these decisions as a matter of stare decisis. In particular, they draw our attention to a line of Eighth Circuit cases beginning with *Feltz v. Central Nebraska Public Power and Irrigation District*, 8 Cir. 1942, 124 F.2d 578[18] and to *Oakland Club v. South Carolina Public Service Authority*, 1940, E.D.S.C., 30 F.Supp. 334, *aff'd*, 4 Cir. 1940, 110 F.2d 84.

We do not read these cases as determinative of the issue before us. In *Feltz*, a FPC licensee condemned land for relocation of a highway. The landowner claimed consequential losses because the property was divided and because of increased distance to the railhead. The jury gave a smaller award than the appraisers, and the court

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17. We note that Congress passed the Federal Power Act in 1920, during the era of *Swift v. Tyson*, 1842, 41 U.S. 1, 10 L.Ed. 865. Thus, Congress would have expected federal courts to apply general common law absent a specific congressional direction to the contrary.

18. The other Eighth Circuit cases are *Central Nebraska Public Power & Irrigation Dist. v. Harrison*, 8 Cir. 1942, 127 F.2d 588, *Central Nebraska Public Power & Irrigation Dist. v. Fairchild*, 8 Cir. 1942, 126 F.2d 302; *Samuelson v. Central Nebraska Public Power & Irrigation Dist.*, 8 Cir. 1942, 125 F.2d 838; *Burnett v. Central Nebraska Public Power & Irrigation Dist.*, 8 Cir. 1942, 125 F.2d 836; *McGinley v. Central Nebraska Public Power & Irrigation Dist.*, 8 Cir. 1942, 124 F.2d 692; and *Central Nebraska Public Power & Irrigation Dist. v. Berry*, 8 Cir. 1942, 124 F.2d 586.

added interest from the date of the taking. Both sides appealed. Among other questions, the court of appeals ruled on the exclusion of evidence of consequential damages, 124 F.2d at 578, and the propriety of interest on a compensation award, 124 F.2d at 584. Without articulating its reasoning, the court indicated that Nebraska law controlled both issues. There is no indication that the parties contested this issue or that the court gave it any serious consideration. Indeed, because of the mixture of issues each party may have thought it to his advantage to rely upon state law. The condemnees had read that state law to allow consequential damages and the condemnor could cite favorable state law on interest. The specific issue of just compensation raised before this Court was not considered. The other Eighth Circuit cases also lack any discussion of a general choice of law problem or of the specific issue before us. In the absence of any reasoned discussion of the difficult choice of law issue, we cannot accept these cases as persuasive authority or interpret congressional inattention to them as an endorsement of the view that state law should fill all substantive gaps in Section 21.

Oakland Club is not on point. In that case the federal licensee enjoyed state as well as federal power of eminent domain. It filed a condemnation in federal court which the property owner contested on the grounds that the South Carolina procedure was constitutionally defective and that Section 21 authorized the licensee to take only an easement rather than a fee.

The district court upheld the state procedure and interpreted Section 21 to authorize the taking of a fee interest. It went on to make several observations that the appellants have emphasized in this case. First, the court stated that Section 21 is not a "comprehensive, self-con-

tained and exclusive law of eminent domain". Second, the court construed Section 21 "not as an exclusive law of eminent domain, . . . but as complementary to the State law, and as enabling the holder of a Federal Power license to exercise in the Federal courts . . . the substantive rights of eminent domain granted to it under the State law." 30 F.Supp. at 341. The Court of Appeals approved of these statements and added its own suggestion that Section 21 was meant to give a condemnor "the privileges of eminent domain under the State law . . ." 110 F.2d 84, 86.

Insofar as the *Oakland Club* litigation stands for the point that Section 21 does not preempt any applicable state powers of eminent domain, it is irrelevant to the issue before us.[19] Insofar as the case supports the argument that Section 21 is solely a jurisdictional provision, we reject it for the reasons already expressed. And insofar as it interprets Section 21 to grant a state rather than a federal power of eminent domain, we find it in conflict with holdings by the Supreme Court. *See Federal Power Commission v. Tuscarora Indian Nation*, 1960, 362 U.S. 99, 120, 80 S.Ct. 543, 4 L.Ed.2d 584; *City of Tacoma v. Taxpayers of Tacoma*, 1958, 357 U.S. 320, 340, 78 S.Ct. 1209, 2 L.Ed.2d 1345; *see also Kohl v. United States*, 1876, 91 U.S. 367, 372-73, 23 L.Ed. 449, 451 (federal government lacks the power to grant the use of a *state* power of eminent domain). Neither the district court nor the Court of Appeals in *Oakland Club* considered the specific issue whether state or federal law governs the methodology of determining compensation under Section 21. In sum, the *Oakland Club* opinions are far too questionable and unclear

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19. This Circuit has held that § 7(h) of the Natural Gas Act, 15 U.S.C.A. § 717f(h), which is almost identical to § 21 of the Federal Power Act, does not preempt state laws of eminent domain. *Robinson v. Transcontinental Gas Pipe Line Corp.*, 5 Cir. 1970, 421 F.2d 1397, *cert. denied*, 398 U.S. 905, 90 S.Ct. 1695, 26 L.Ed.2d 64.

to justify adherence by this Court or to warrant an interpretation of congressional failure to comment upon them as an expression of legislative intent on the choice of law issue before us.[20]

III.

We now proceed to the principal issue. Because the source of the power delegated by the Federal Power Act is federal, the governing law must be federal. *See, e. g.*, Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383, 407 (1964); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U.Pa.L.Rev. 797, 798-801 (1957); Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U.Chi.L.Rev. 823, 826-27 (1976). Of course, federal law may be fashioned by adopting parallel state rules. *E. g., Clearfield Trust Co. v. United States*, 1943, 318 U.S. 363, 367, 63 S.Ct. 573, 87 L.Ed. 838. For instance, the courts usually determine what constitutes "property" by looking

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20. The other cases cited in various landowner briefs as expressing a direct or indirect conclusion that state law of compensation applies in a Section 21 condemnation are also off the mark. *King v. Grand River Dam Auth.*, 10 Cir. 1964, 336 F.2d 682, expressly refuses to reach the issue. *Id.* at 683. In *Tennessee Gas Transmission Co. v. Thatcher*, 1949 W.D.La., 84 F.Supp. 344, *aff'd sub nom Thatcher v. Tenn. Gas Transmission Co.* 5 Cir. 1950, 180 F.2d 644, *cert. denied*, 340 U.S. 829, 71 S.Ct. 66, 95 L.Ed. 609, a landowner challenged § 7(h) of the Natural Gas Act. Among his theories was one that the Act violates the fifth amendment because it makes no provision within itself for ascertaining and paying adequate compensation. The district court rejected this challenge, noting that "it has been uniformly held that state *procedure* may be used in condemnation cases under Federal Laws" and citing *Oakland Club*. *Id.* at 346 (emphasis added). The Court of Appeals did not discuss the question specifically. The trial judge's statement is ambiguous and may refer only to procedural matters that have been governed by Rule 71A since 1951. At any rate, the complete lack of reasoning to support the statement undercuts any comfort the opinion may give to the appellants here. All the other cases cited as precedent for appellants' position are also either off point or unpersuasive.

to state law. *E. g., United States v. Certain Property Located In Borough of Manhattan*, 2 Cir. 1965, 344 F.2d 142, 144-45 (Friendly, J.); *United States v. 145.30 Acres of Land*, 1974 D.La., 385 F.Supp. 699, *aff'd*, 5 Cir. 1975, 524 F.2d 1231.

Courts apply independent rules, however, when considering the specific issue of compensation in federal condemnations. *E. g., United States v. Miller*, 1943, 317 U.S. 369, 380, 63 S.Ct. 276, 87 L.Ed. 336; *United States v. Certain Property Located in Borough of Manhattan*, 2 Cir. 1965, 344 F.2d 142, 146; *United States v. City of New York*, 2 Cir. 1948, 165 F.2d 526, 528 (L. Hand, J.); *United States v. Certain Parcels of Land*, 3 Cir. 1944, 144 F. 2d 626, 628; *United States v. 3,595.98 Acres of Land*, 1962 N.D.Cal., 212 F.Supp. 617; 12 Wright & Miller, *Federal Practice and Procedure: Civil* § 3042 (1973). These cases did not arise in the specific context of a federal condemnation by a Federal Power Act licensee pursuant to Section 21. Nevertheless, we should follow the same rule unless there are circumstances unique to a federal condemnation under Section 21 which require the opposite result.[21]

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21. Despite the dissent's implication to the contrary, we are well aware of Judge Friendly's distinction between the question whether an issue is a federal one so that federal courts may formulate a rule of decision and the question whether the rule formulated should follow state or uniform national law. Judge Simpson reads these cases to establish only the first step, that compensation in a federal condemnation is a federal question. But the cases take the second step. They chose to apply uniform nation-wide rules.

For instance, as the excerpt quoted by the dissent shows, dissenting opinion, at p. 1196 n. 6, the Supreme Court in *Miller* saw no need to determine local law of compensation. The reason was that the Court applied federal rules of decision. 317 U.S. at 373-79, 63 S.Ct. 276. The dissent singles out *United States v. Certain Property* as an example of a proper analysis of the choice of law issue. Dissenting opinion, at p. 1196 n. 7. The quoted segment suggests that Judge Friendly refused to rely on national law in federal condemnations. In fact, the quotation comes from a sec-

(Continued on following page)

The appellants suggest that several such circumstances exist. First, they contend that we should distinguish between cases where the United States is a party and where it is not, applying federal rules of compensation only in the former situation. Since a licensee exercises the federal power of eminent domain, it is not immediately apparent why such a distinction should be made. That the property will be used privately is not reason enough. In *Miller*, for instance, the United States took land for use by a private railroad. Appellants, however, cite *Public Utility District No. 1 v. City of Seattle*, 9 Cir. 1967, 382 F.2d 666, 1969, *cert. dismissed*, 396 U.S. 803, 90 S.Ct. 22, 24 L.Ed.2d 59, and *Tacoma v. Taxpayers of Tacoma*, 1957, Wash., 307 P.2d 567, *rev'd*, 357 U.S. 320, 78 S.Ct. 1209, 2 L.Ed.2d 1345, to support a theory that the Federal Power Act delegates less than the full power of eminent domain. As a result, the appellants continue, a licensee should not benefit from the same legal rules as the United States.

In *City of Seattle* the Court considered whether a licensee must compensate the owner of shorelands and, for

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Footnote continued—

tion of the opinion dealing only with the definition of "property", an issue not raised in this case. When Judge Friendly considered the much more relevant compensation question he acknowledged that compensation in federal condemnation is set by federal rules. He looked to state decisions only "in the absence of some authoritatively determined federal rule to the contrary" and only to the extent that the persuasiveness of state decisions justified including them into the national law. 344 F.2d at 147.

Nowhere do we suggest that the proper analysis for a choice of law question changes because the issue is one of just compensation in a federal condemnation. Nor do we consider ourselves blindly bound by past cases in the sense of reading them to mandate federal rules of compensation in every federal condemnation. We do find, however, that these cases are helpful starting points. Other courts in federal compensation cases have balanced the state and federal interests and have concluded that federal, rather than state, law should supply the rules of compensation. Unless we find the weights on our scale to be substantively different, we see no reason to diverge from the conclusion of the Supreme Court and some of our Courts of Appeals.

power site values, the owner of adjoining uplands, for property needed for a licensed hydroelectric project. The United States would not have paid any compensation if it had condemned the same property. Instead, it could have relied upon the dominant navigational servitude for its power to utilize without compensation the stream bed and shorelands of navigable waters up to the ordinary high water level. *See* 382 F.2d at 669; *United States v. Twin City Power Co.*, 1956, 350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240. The Ninth Circuit examined the Federal Power Act and determined that it did not delegate the dominant servitude of navigation. Thus, it found that in the circumstances before it a licensee must pay compensation because it, unlike the Government, takes something it does not already have. 382 F.2d at 672. With respect to power site values, the Court determined that the rule precluding assertion of power site value against the United States, *United States v. Twin City Power Co.*, 1956, 350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240, goes "hand in hand" with the dominant navigational servitude and thus is not available to a licensee. 382 F.2d at 673-74.

Whether a licensee enjoys the dominant navigational servitude is irrelevant to the issue before us. The Ninth Circuit did not question that Section 21 delegates some of the federal government's powers. And the opinion does not support the contention that a licensee enjoys anything less than the full federal power to condemn private property. Significantly, when the Ninth Circuit turned to the amount of compensation due the shoreland and upland property owners it relied exclusively on federal cases. *See* 382 F.2d at 673-74.

Tacoma holds that Section 21 does not give a licensee power to condemn state-owned land. The theory of the case appears to be that Congress *could not* delegate such

power to a state-created entity, rather than that it did not intend to do so. 207 P.2d at 577. This theory is questionable at best. *See First Iowa Hydro-Electric Co-operative v. Federal Power Commission,* 1946, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143; *Kohl v. United States,* 1876, 91 U.S. 367, 23 L.Ed. 449; *Washington Department of Game v. Federal Power Commission,* 9 Cir. 1953, 207 F.2d 391, 1954, *cert. denied,* 347 U.S. 936, 74 S.Ct. 626, 98 L.Ed. 1087.[22] Even if this holding is correct, it does not affect a licensee's power to acquire privately held land.

Although the Supreme Court has never ruled directly on the scope of the delegation of federal power in Section 21, *Federal Power Commission v. Tuscarora Indian Nation,* 1960, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584, suggests that the delegation is not a limited one. As part of its case against condemnation by a FPC licensee, the Indian Nation argued that 25 U.S.C. § 177[23] applied to the condemnation of its lands. The Court rejected this contention:

> But § 177 is not applicable to the sovereign United States *nor hence to its licensees* to whom Congress has delegated federal eminent domain powers under § 21 of the Federal Power Act.

362 U.S. at 120, 80 S.Ct. at 555 (emphasis added). In its discussion of this point the Court cited decisions in which the United States was a party without any indication they

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22. Although the Supreme Court reversed *Tacoma* on the technical ground that the state litigation constituted an improper collateral attack on a FPC determination, the Court's opinion casts doubt on the validity of the state court's substantive holding as well. *See City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 339-40, 78 S.Ct. 1209, 2 L.Ed.2d 1345.

23. No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . .

would not be equally applicable to a federal licensee. *See* 362 U.S. at 120-21, 80 S.Ct. 543.

Similarly, in *Grand River Dam Authority v. Grand-Hydro,* 1948, 335 U.S. 359, 69 S.Ct. 114, 93 L.Ed. 64, the Supreme Court appears to draw no distinction between the federal government and its licensee under the Federal Power Act:

> If either the United States, or its licensee as such, were seeking to acquire this land under the Federal Power Act, it might face different considerations from those stated above.

335 U.S. at 373, 69 S.Ct. at 121. *See also Public Utility District No. 1 v. City of Seattle,* 9 Cir. 1967, 382 F.2d 666, 675 (Byrne, J., dissenting), 1969, *cert. dismissed,* 396 U.S. 803, 90 S.Ct. 22, 24 L.Ed.2d 59.

In summary, we find no reason to ignore the general rule of following federal law to set compensation in a federal condemnation because the United States is not taking the land directly.

Second, the appellants have argued that the federal interest in the value of property taken in a Section 21 proceeding is so small that the analysis established by *Clearfield Trust Co. v. United States,* 1943, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 and its progeny, including most recently *Miree v. DeKalb County,* 1977, ... U.S. ....., 97 S.Ct. 2490, 53 L.Ed.2d 557, compels federal adoption of state law. Even if a sharp distinction between a licensee and the United States cannot be drawn, it may be that the federal interest in the price paid for licensed hydroelectric plants is less than in other government projects. If so, use of state law would be appropriate notwithstanding the usual rule that federal common law of compensation governs in federal condemnation.

A review of *Clearfield, Miree,* and other federal common law decisions fails to convince us, however, that state law should be followed. That review reveals a changing emphasis of factors and shifting preferences for one law or the other. In *Clearfield Trust* the Court chose uniform federal common law to govern an action against the United States on a federal check. The federal interest in uniformity for easier administration was sufficient to justify use of uniform federal common law. *See* 318 U.S. at 366, 63 S.Ct. 573; Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test,* 43 U.Chi.L.Rev. 823, 831 (1976).

United States v. Standard Oil Company, 1947, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 also took a hospitable stance to the use of federal common law. That case posed the question whether United States could recover for damages suffered when a serviceman is injured. The Court found first that the source of any legal right to recover should be federal. It then held such federal law should be uniform because there was no affirmative need for diverse results, the issue did not involve local concerns, and a uniform rule would be appropriate in fiscal matters. *Id.* at 310-11, 67 S.Ct. 1604.

Other cases diverge from this presumption favoring federal law. For instance, *Bank of America v. Parnell,* 1956, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 refused to extend the *Clearfield* approach of uniform law to suits between private parties simply because the subject matter of the controversy happens to be federal commercial paper. Instead, the Court indicated that an immediate federal interest must be involved. *Id.* at 33-34, 77 S.Ct. 119. And in *Wallis v. Pan American Petroluem Corp.,* 1966, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369, the Supreme Court indicated that state law should usually govern unless a

"significant conflict between some federal policy or interest and the use of state law in the premises" is shown. *Id.* at 68, 86 S.Ct. at 1304. *Accord Miree v. DeKalb County*, 1977, ... U.S. ....., 97 S.Ct. 2490, 53 L.Ed.2d 557. The Court found no such interest in *United States v. Yazell*, 1966, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404, a suit by the federal government to collect a debt owed the Small Business Administration. The Court held that Texas community property rules would apply because the Small Business Administration had individually negotiated the loan in the context of and with specific reference to Texas law and because the role of the United States as creditor in the case was no different from any private creditor. The Court also noted the intense local interest in family property and the protection of women, as well as the lack of any existing federal common law to apply. *Id.* at 346-53, 86 S.Ct. 500. In *United States v. Little Lake Misere Land Co.*, 1973, 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187, on the other hand, the Supreme Court refused to adopt state law. The issue in *Little Lake* was whether a state statute retroactively making mineral rights imprescriptible should govern federal land acquisitions under the Migratory Bird Conservation Act.[24] Adoption would have deprived the federal government of a contract transferring the mineral rights to the land in question ten years after its acquisition. The statute conflicted with the federal program because it deprived the government of its contractual interests and created uncertainty in land transactions under the Act. *Id.* 382 U.S. at 596-99, 86 S.Ct. 500.

Together these cases produce a balancing test. *See generally* Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U.Chi.L.Rev. 799

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24. 16 U.S.C. § 715 *et seq.* (1970).

(1976). On one side is the federal interest in carrying out a program in the most efficient and effective manner possible. On the other is a state's interest in the preservation of its control over local interests, particularly traditional interests such as family law and real property transactions, and in preventing displacement of state law. Of course, the ultimate goal of the creation of federal law by the courts is to carry out the federal program in question. *See United States v. Little Lake Misere Land Co.*, 412 U.S. at 584-601, 93 S.Ct. 2389; *United States v. Standard Oil Co.*, 332 U.S. at 309-11, 67 S.Ct. 1604. Thus, if state law would actually frustrate rather than only hinder a federal program, federal common law *must* be applied regardless of state interests. *See, e. g., United States v. Little Lake Misere Land Co.* On the other hand, the Supreme Court has demonstrated a growing desire to minimize displacement of state law. *See Miree v. DeKalb County*, 1977, ... U.S. ....., 97 S.Ct. 2490, 53 L.Ed.2d 557.

Each side of this controversy has provided us with weights for its side of the scale. Georgia Power points to the degree of federal involvement in a licensed project. A license is a prerequisite to construction of a project. 16 U.S.C. § 817 (1970). The design, construction, recreation facilities, and ecological impact of a project are subject to approval by the FPC. 16 U.S.C. § 803, (1970), 18 C.F.R. § 4.41 *et seq.* (1977). The Commission has certain powers to regulate the rates and charges of electricity generated by the project. 16 U.S.C. §§ 812-13 (1970). Georgia Power also points out that the federal government has a financial interest in minimizing acquisition costs for a licensed project since it holds an option to acquire the project when the license expires upon payment of net investment, less certain items. 16 U.S.C. § 807 (1970). In addition, Georgia

Power notes that the government may acquire a project in time of national emergency, 16 U.S.C. § 809 (1970).

The landowners emphasize that this lawsuit involves private parties and that Georgia Power (or any other licensee) is likely to condemn property only in the state where it operates. They also point out that property rights are a traditional state concern and that Georgia has an elaborate law of eminent domain that reflects considered policy judgments a state would want the federal courts to respect. Finally they contend that no substantial rights and duties of the United States hinge on the outcome of this litigation.

The balance tips toward the need for federal law. That this controversy is between private parties is not determinative. *Miree v. DeKalb County*, ... U.S. ....., ..., 97 S.Ct. 2490, 53 L.Ed.2d 557 (Burger, C. J., concurring); *United States v. Little Lake Misere Land Co.*, 412 U.S. at 592-93, 93 S.Ct. 2389; *Bank of America v. Parnell*, 352 U.S. at 34, 77 S.Ct. 119. Nor must we automatically apply state law because property is involved. *Little Lake* involved a property transaction. Moreover, eminent domain is not like most areas of property law, where state regulation has been virtually exclusive, but one where the United States has developed and exercises an independent power. *See, e. g., Kohl v. United States*, 91 U.S. 367, 23 L.Ed. 449.

One possible reason for adopting state law as the federal rule of decision is the advantage of knowing what state law says compared with the uncertainty as to rules the federal courts would create. *See McKenna v. Wallis*, 5 Cir. 1965, 344 F.2d 432, 444 (Wisdom, J., dissenting), *rev'd sub nom., Wallis v. Pan American Petroleum Corp.*, 1966, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369; Note, *The Federal Common Law*, 82 Harv.L.Rev. 1512, 1519 (1969). Since

federal law on compensation already exists, there is no such reason to adopt state law here.[25]

Most importantly, federal common law of compensation is the appropriate choice in this case because the use of state law could interfere with achievement of congressional aims. Even when Congress passed the Federal Power Act in 1920 its primary concern was to stimulate private development of America's hydroelectric power resources. *See, e. g., First Iowa Hydro-Electric Cooperative v. Federal Power Commission,* 1946, 328 U.S. 152, 180, 66 S.Ct. 906, 90 L.Ed. 1143; 56 Cong.Rec. 9810 (remarks of Mr. LaFollette); H.R.Rep.No.715, 65th Cong., 2d Sess. 15. That goal has become even more significant with the energy shortages of the 1970's and the adoption of a national policy to reduce dependence on foreign sources of energy. To fulfil that congressional policy, hydroelectric development

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25. At oral argument, appellants contended for the first time that there is no federal common law of compensation. They would limit *United States v. Miller,* 1943, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 and *Bauman v. Ross,* 1896, 167 U.S. 547, 17 S.Ct. 966, 42 L.Ed. 270, along with their rules that compensation need not include an increase in value created by the condemning project and may be offset by benefits created in remaining property, to the specific statutes implicated in the cases.

This contention should have been raised long ago so the trial court could have considered it. Without ruling on the propriety of the instructions actually given below—an issue not properly before us, *see, e. g., Commercial Credit Business Loans, Inc. v. St. Louis Terminal Field Warehouse,* 5 Cir. 1974, 514 F.2d 75, 77—we reject the appellants' general point that there is no federal common law of compensation. Cases such as *Miller* and *Bauman* have force independent of their statutory context. *See, e. g., United States v. Trout,* 5 Cir. 1967, 386 F.2d 216, 221. They hold that the compensation requirements of the fifth amendment—not solely of the statutes involved—are satisfied when project enhancement value is excluded and a set-off for specific benefits to remaining property is allowed. Only the fifth amendment limits the federal power of eminent domain, 1 *Nichols' The Law of Eminent Domain* §§ 1.14 & 1.3 (rev. 3d. ed. 1976). Since we find no indication that Congress did not delegate all of the federal power to condemn private property, the federal law defining the minimum compensation requirements of the fifth amendment becomes the law of compensation for a § 21 case.

must be maximized. The use of state rules of compensation when they would produce a substantially higher award for the landowner could retard development and frustrate the goal of full utilization of hydroelectric resources. If we considered only the increased cost to the Lake Wallace project from these appeals the interference with the federal policy might not appear significant. When, however, all the acquisitions for a major project are grouped together, and even more so when many licensed projects are considered as an aggregate, the increase in cost and the accompanying chill on development resulting from adoption of state rules such as those in Georgia would be substantial. State compensation rules could also interfere with the national interest in reducing energy costs because the higher land acquisition expenses would need to be offset by higher utility rates.

The federal government's option under Section 14 of the Act, 16 U.S.C. § 807, to acquire a project at the expiration of a license creates another United States interest in minimizing the cost of licensed facilities by applying federal valuation rules. *See First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. at 172-73, 66 S.Ct. 906;[26] *Public Utility District No. 1 v. City of Seattle*, 9 Cir. 1967, 382 F.2d 666, 675 (Byrne, J. dissenting) 1969, *cert. dismissed*, 396 U.S. 803, 90 S.Ct. 22, 24 L.Ed.2d 59. Congress expressed an interest in keeping this option price down when it passed the Federal Power Act. Rep. Ferris submitted a Minority Report to the original House Bill,

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26. In *First Iowa* the Supreme Court wrote:

> The closeness of the relationship of the Federal Government to these [licensed] projects and its obvious concern in maintaining control over their engineering, economic and financial soundness is emphasized by such provisions as those of § 14 authorizing the Federal Government, at the expiration of a license to take over the license project . . .

328 U.S. at 172-73, 66 S.Ct. at 915-16.

because it did not include a provision limiting the option price of projects which had decreased in value to the fair value of the property taken, H.R.Rep. No.715, 65th Cong., 2d Sess. 40 (Minority Report). In Rep. Ferris' eyes, this omission meant the option price could be so high that no government would be justified in paying it. *Id.* at 40. Congress eventually added Rep. Ferris' amendment, thereby expressing an interest in controlling acquisition costs. Use of federal compensation standards would reduce the option price and further this congressional desire to make government acquisition a realistic possibility.

For these reasons, we find that nothing in *United States v. Clearfield Trust Co.* and its progeny gives reason to diverge from the practice of employing federal compensation rules in a federal compensation proceeding. If anything, those cases push toward use of the federal law. As required by *Wallis v. Pan American Petroluem Corp.*, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369, a significant conflict between the federal policy of the Federal Power Act and the use of Georgia law can be shown.[27]

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27. Judge Simpson disputes this conclusion. He says our concern that Georgia law may interfere with the development of hydroelectric power has led us down the wrong path travelled by the panel majority in *McKenna v. Wallis*. Dissenting opinion, at p. 1198. We disagree. The legislative history to the Federal Power Act shows that Congress strongly sought full and rapid development of hydroelectric power. That federal interest is solid and important. The panel in *Wallis* relied on a federal policy against monopolization of federally owned mineral deposits as well as a policy of development. The Supreme Court reversed the panel not because those policies were abstract or unimportant, but because Louisiana law did not interfere with them.

Wallis turned on whether the interstices of a federal statute making federal oil and gas leases assignable should be filled with Louisiana law which did not recognize title by parol and resulting or constructive trusts. The panel majority's conclusion that Louisiana law would frustrate important policies rested on the unusual and speculative premise that:

(Continued on following page)

The appellants have raised a third argument against federal law in Section 21 cases. They contend that if we apply federal common law, licensees such as Georgia Power will have the choice of a Section 21 suit in federal court with federal rules or a suit in state court governed by state law. This, they continue, is the type of forum shopping *Erie Railroad Co. v. Tompkins* condemns. *See also Hanna v. Plumer*, 1965, 380 U.S. 460, 85 S.Ct. 1136, 14 L. Ed.2d 8; *see generally*, Ely, *The Irrepressible Myth of Erie*,

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Footnote continued—

> Trusts ex maleficio are part of the congressional scheme for carrying out the national policies on mineral resources and monopoly. In litigation between private persons over the nature of the ownership of a federal mineral lease, national policies on mineral resources and monopoly will suffer unless courts recognize beneficial title to the lease in a claimant whom the Secretary has not investigated and has not approved as lessee, and who may be unknown to the Secretary.

McKenna v. Wallis, 5 Cir. 1965, 344 F.2d 432, 447-48 (Wisdom, J., dissenting), *rev'd*, 384 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369.

The civil law of Louisiana was clear and both easy and inexpensive to apply. In some ways, it promoted federal interests better than the common law. 344 F.2d at 446 (Wisdom, J., dissenting). It is certainly difficult to see how the choice of Louisiana law would interfere with the policies the panel majority claimed to be protecting. The federal government has the power to disapprove assignments running afoul of the anti-monopoly policy no matter what law governs assignments. 384 U.S. at 70, 86 S.Ct. 1301. Nor did the panel explain how the trust ex maleficio—rarely invoked even in jurisdictions that recognize it—could encourage development.

The difference in this case arises from the simple fact that people are more hesitant to pay more money for property than they are to meet inexpensive filing requirements. That Georgia provides some formula of compensation does not mean state law offers a feasible route to the federal objective if the resulting cost is substantially higher. We disagree with the dissent's assertion that any interference from the Georiga statute is conjectural. Dissent, at p. 1190. In No. 75-4448 the difference amounts to $540 an acre—a substantial difference totaling almost $30,000 for that small tract alone. If Georgia law added a similar premium on every acre needed for the project the additional cost would be $11,456,100. Even if the average premium is only one-tenth of the one in No. 75-4448, the extra cost will be over $1,000,000. It is more than conjecture to conclude that such additional costs could interfere with the policy of full hydroelectric development.

87 Harv.L.Rev. 693 (1974). *Erie*, of course, does not apply directly to this litigation because the source of the Section 21 condemnation power is federal. *E. g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838.

Any broader implications of the *Erie* decision about the desirability of uniformity between state and federal courts do not apply here either. If a licensee were to bring a Section 21 condemnation action in a state court, that court would be required to follow the same law as a federal court even if that were federal common law. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383, 405 (1964). *See also* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* at 825 (1973). If the proceeding in the state court is under the federal power, the defendant may remove. 7 *Moore's Federal Practice* ¶ 71A.10[2] at 71A-252 (2d ed. 1975).[28] Thus, there would not be different substantive rules of decision depending upon the forum chosen. If a licensee brought a *state* condemnation action in state court, state law would govern. *E. g., Grand River Dam Authority v. Grand Hydro*, 335 U.S. at 372-73, 69 S.Ct. 114. But, if a state condemnation action were brought in federal court—assuming there is jurisdiction[29]—state law would also govern of its own

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28. A state based condemnation brought in state court by a federal licensee is not removable. 7 *Moore's Federal Practice* ¶71A.10[2] at 71A-253 (2d ed. 1975); *Algonquin Gas Transmission Co. v. Gregory*, D.Conn.1952, 105 F.Supp. 64, *cert. denied*, 344 U.S. 818, 73 S.Ct. 13, 97 L.Ed. 637.

29. Since § 21 does not appear to grant jurisdiction over state based condemnations, *but see Oakland Club v. South Carolina Public Service Ass'n*, 4 Cir. 1940, 110 F.2d 84, 86 and since a licensee's claim based on state law is not a federal question for purposes of jurisdiction on the basis of a general federal question, 7 *Moore's Federal Practice* ¶71A.11 (2d ed. 1975), such jurisdiction would most likely be based upon diversity of citizenship. *See* 12 Wright & Miller, *Federal Practice and Procedure: Civil* § 3055 (1973), 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3577 (1975).

force under *Erie*. 12 Wright & Miller, *Federal Practice and Procedure*: *Civil* § 3055 (1973). Again, there would be no difference in substantive law according to forum. Insofar as the appellants' argument rests on the possibility that different substantive rules might be applied in a *state* action in state court compared with a *federal* action in federal court, they can find no comfort in *Erie*. Justice Brandeis said nothing about a need for uniformity in different causes of action based on similar or even identical facts.

IV.

The appellants argue *to us* that a decision to apply federal common law in this litigation would render Section 21, as applied, unconstitutional. The theory is that a law permitting Georgia Power to "grant" the benefits of Georgia law arbitrarily through its choice of forum denies equal protection to landowners sued under the federal rather than the state statute. This contention was mentioned (though not developed) in several of the original answers to Georgia Power's condemnation complaint, but otherwise appears to have received no attention below.[30] Part of the argument rests on a disputed factual assertion that Georgia Power arbitrarily discriminates among condemnees by bringing some state suits in state court, where the court would apply the more generous compensation formula, against landowners situated similarly to appellants. The district court had no opportunity to rule on this factual dispute or the equal protection argument. Therefore, we need not consider them. *See, e.g., Commercial Credit Business Loans, Inc. v. St. Louis Terminal Field Warehouse*, 5 Cir. 1974, 514 F.2d 75, 77; *E. E. O. C. v. Standard Forge and Axle Co.*, 5 Cir. 1974, 496 F.2d 1392, 1394-95; *D. H. Overmyer Co. v. Loflin*, 5 Cir. 1971, 440 F.2d 1213, 1215, *cert.*

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30. The district court did not mention the issue in its order denying the motion to apply federal law.

denied, 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90. To the extent the equal protection issue is before us, we find it without merit. There can be no contention that any landowner will be awarded constitutionally inadequate compensation if federal law controls since the federal rules satisfy the requirements of the fifth amendment. *See, e. g., United States v. Miller,* 1943, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336. Nor can we seriously consider the possibility that there are constitutional difficulties whenever a prosecutor or other plaintiff meeting state action requirements may choose between two or more causes of action with different consequences for defendants. If there were, the Justice Department could not constitutionally choose to bring a civil antitrust suit against one offender and a criminal suit against another.

V.

The appellants have made several other arguments in their briefs and at oral argument which we regard as unnecessary to discuss in this opinion. We have, however, considered these arguments. We find them to be without merit.

NO. 75-4448—AFFIRMED.

NO. 77-1327—AFFIRMED AND REMANDED FOR FURTHER PROCEEDINGS.

SIMPSON, Circuit Judge, dissenting:

Congress in enacting a general scheme for the regulation of hydroelectric power, has authorized a state party licensed by the Federal Power Commission to bring a federal eminent domain action, but has failed to specify whether state or federal law should govern the measure of compensation. It is our function as a federal court to choose which law to apply, neither having been legis-

latively mandated. Our choice must follow the Supreme Court's pronouncements regarding federal common law. Believing that the majority in this case has wrongly chosen to apply federal law, I dissent in order to register the reasons for my disagreement.

I. WHEN AND HOW TO MAKE A CHOICE OF LAW

In exercising its commerce power to enact a comprehensive regulatory plan, Congress recognized a distinct federal interest in the use of navigable waters for producing hydroelectric power. 16 U.S.C. §§ 791a et seq. (1970) (The Federal Power Act). As is the case with any federal legislation, Congress acted "against the background of the total *corpus juris* of the states". *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966), citing Hart & Wechsler, The Federal Courts and the Federal System 435 (1953). Although the federal statute necessarily displaces some state law, the " 'presence of a federal statute does not necessarily imply that there is a congressional intent that any particular issue be resolved by reference to federal law' ".[1] "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress". *Wallis, supra,* at 68, 86 S.Ct. at 1304. A choice of law problem arises when Congress has failed to make that decision; the courts must then fill the vacuum by deciding which law shall govern. As Judge Friendly has put it:

> The issue that must be determined in each instance is what heed Congress intended to have paid to state law in an area where no heed need constitutionally be

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1. Note, *The Competence of Federal Courts to Formulate Rules of Decision,* 77 Harv.L.Rev. 1084, 1090 (1964), cited in *McKenna v. Wallis,* 344 F.2d 432, 450 (5th Cir. 1965) (Wisdom, J., dissenting), *rev'd sub nom., Wallis v. Pan American Petroleum Corp.,* 382 U.S. 63, 86 S.Ct. 1301, 16 L.Ed.2d 369 (1966).

paid—more realistically, in Gray's famous phrase, "to guess what it would have intended on a point not present to its mind, if the point had been present".[2]

Regardless of whether state or federal law is chosen, "the question is one of federal policy . . . . And the answer to be given necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law". *United States v. Standard Oil Co.*, 332 U.S. 301, 309-10, 67 S.Ct. 1604, 1609, 91 L.Ed. 2067 (1947). In his prescient dissent in *McKenna v. Wallis*, Judge Wisdom explained how the principles of federalism affect the choice of law:

> Before a court plugs a statutory gap with federal law that is inconsistent with local law . . . consideration for the position of the states in the federal system suggests that the Court find congressional intent that federal common law should prevail over state law. . . . When congressional intent is unclear or when a specific congressional intent never existed, a reasonable criterion is that judge-made common law should not prevail over local law unless that result is manifestly in the national interest. 344 F.2d at 444-45.

Judge Wisdom's view prevailed in the Supreme Court. In reversing the Fifth Circuit in *Wallis*, the Court stated: "In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown." *Wallis, supra*, at 68, 86 S.Ct. at 1304. This lan-

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2. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L.Rev. 383, 410 (1964).

guage nearly, if not quite, establishes a presumption favoring state law in choice of law cases.[3]

A review of the Supreme Court's decisions in this area reveals a far more certain direction than what the majority calls "a changing emphasis of factors and shifting preferences for one law or the other". Majority opinion, *supra* at 1188. Because the decision is one of federal policy, it will always be possible to identify some federal interest, and thus some conflict with state law necessitating a choice.[4] The key, as stated in *Wallis*, is that this conflict be "significant". Thus, in the seminal case of *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943), federal law was chosen because

> [t]he issuance of commercial paper by the United States is on a vast scale . . . The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. *Id.* at 367, 63 S.Ct. at 575.

In *Standard Oil Co. v. United States, supra*, the strength of the federal interest argued forcefully in favor of applying

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3. Judge Wisdom favored such a presumption in his *Wallis* dissent when he wrote: "The political logic of federalism supports placing the burden of persuasion on those urging national action". 344 F.2d at 445, quoting Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum.L.Rev. 543, 545 (1954). I find it incongruous that Judge Wisdom, whose position in *Wallis* was adopted by the Supreme Court, today dilutes his own proposition of a decade ago by writing that "the Supreme Court has demonstrated a growing desire to minimize displacement of state law", majority opinion, supra at 1189.

4. Of course, if application of either federal or state law would yield the identical result, there is no need to make a choice. See, e. g., *United States v. 3,595.98 Acres of Land*, 212 F.Supp. 617 (N.D.Cal.1962).

federal law: "perhaps no relationship between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces". 332 U.S. at 305, 67 S.Ct. at 1607. Similarly, in *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973), state law directly hostile to a clear, congressionally declared federal interest was displaced because:

> [t]o permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed to all other federal land acquisition programs. These programs are national in scope. . . . Certainty and finality are indispensable in any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds. *Id.* at 597, 93 S.Ct. at 2399.

In contrast, where the federal interest is attenuated or speculative, the cases favor application of state law absent a showing that such law is clearly inadequate to serve the federal interest. Thus, in *Bank of America National Trust and Savings Association v. Parnell*, 352 U.S. 29, 77 S.Ct. 119, 1 L.Ed.2d 93 (1956), state law was applied because the possibility that "the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter . . . is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern". *Id.* at 33, 77 S.Ct. at 121. In *Wallis v. Pan American Petroleum Corp., supra*, although a panel of this Court concluded that the federal interest in promoting exploration for

development of domestic reserves of oil and gas, as expressed in the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 et seq., demanded application of federal common law to the assignability of leases, 344 F.2d at 441-442, the Supreme Court disagreed: "However fitting this approach may be where a State interposes unreasonable conditions on assignability, it can have no force in this instance because Louisiana concededly provides a quite feasible route for transferring any mineral lease . . ." 384 U.S. at 71, 86 S.Ct. at 1305. This Court was again reversed in *Miree v. DeKalb County, Ga.*, ... U.S. ....., 97 S.Ct. 2490, 53 L.Ed. 2d 557 (1977), in which the survivors of deceased airline passengers attempted to sue the county, as owner of a municipal airport, on a third party beneficiary theory, claiming protection under a contract between the county and the Federal Aviation Administration. The county claimed immunity from suit under Georgia law. Holding that state law should be applied, the Court noted that even though "the United States has a substantial interest in regulating aircraft travel and promoting air travel safety", this interest was too remote and speculative to warrant application of federal law "given the narrow question before us". *Id.* at ....., 97 S.Ct. at 2495.

II. CHOICE OF LAW AND COMPENSATION IN FEDERAL CONDEMNATIONS

My first point of departure from the majority is in their apparent conclusion that the rules governing choice of law are different in the context of compensation in federal eminent domain actions. The majority states that "[c]ourts apply independent rules, however, when considering the specific issue of compensation in federal condemnations", and considers itself bound to follow these "independent rules" "unless there are circumstances unique to a federal condemnation under Section 21 which

require the opposite result". Majority opinion, supra, at 1186. After rejecting possible distinctions based on Section 21, the majority concludes: "In summary, we find no reason to ignore the general rule of following federal law to set compensation in a federal condemnation because the United States is not taking the land directly". Id. at 1188.

With due respect, I think the majority misreads the cases dealing with choice of law in federal condemnation. The cases cited by the majority opinion, beginning with *United States v. Miller,* 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943), clearly establish that compensation in federal condemnation *is a federal question.*[5] What these cases do not establish, as I think the majority incorrectly interprets them, is that the federal common law of compensation is presumed to govern in all federal condemnations.[6]

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5. " 'Just compensation' is a federal question, as to which the state decisions are not authoritative". *United States v. City of New York,* 165 F.2d 526, 528 (2nd Cir. 1948).

6. In *Miller,* respondents argued that state law should be applied because Congress had so required. The Court replied:

> We need not determine what is the local law, for the federal statutes upon which reliance is placed require only that, in condemnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by the law of the State in which the court sits. They do not, and could not, affect questions of substantive right,—such as the measure of compensation,—grounded upon the Constitution of the United States. 317 U.S. at 379-80, 63 S.Ct. 283 [footnotes omitted].

This language is subject to many interpretations. To the extent that it may read to indicate that Congress "could not" apply state law to "the measure of compensation", it is dicta and of doubtful validity. Some courts have read *Miller* this broadly. *See, e. g., United States v. 63.04 Acres of Land,* 154 F.Supp. 198, 202 (E.D.N.Y.1957) ["Since we are dealing with a federal question (just compensation), the State Court rules or criteria are not controlling or persuasive".]; 12 Wright & Miller, Federal Practice and Procedure: Civil § 3042 (1973). The principles of federalism argue strongly against so absolute a rule. Surely the theory underlying this rule was rejected by the Supreme Court

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This distinction was concisely explained by Judge Friendly in his analysis of *Clearfield Trust*:

> *Clearfield* decided not one issue but two. The first . . . is that the right of the United States to recover for conversion of a Government check is a federal right, so that the courts of the United States may formulate a rule of decision. The second . . . is whether, having this opportunity, the federal courts should adopt a uniform nation-wide rule or should follow state law.[7]

In federal condemnation actions compensation is clearly a federal question. But whether it is resolved by

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Footnote continued—
in *Clearfield Trust* when it observed: "In our choice of the applicable *federal* rule we have occasionally selected state law". 318 U.S. at 367, 63 S.Ct. at 575 (emphasis added). *See also Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 107, 92 S.Ct. 1385, 1395, 31 L.Ed.2d 712 (1972) ["While federal law governs, consideration of state standards may be relevant".]

The majority argues that it has not misread the cases it cites because "the cases take the second step. They chose to apply uniform nation-wide rules". Majority opinion, supra, at 1186 n. 21. The issue, however, is *why* federal law was chosen in each of those cases—what specific federal interests dictated that choice. Without analyzing those interests in depth here, see, e. g. notes 8 and 10, *infra*, I do note that in each of the cited cases the United States was the party condemning *and paying for* the land. In the instant case, a state utility will pay for the land. Surely this is relevant to determining the nature of the interests at stake. See note 11 *infra*.

7. Friendly, *supra* note 2, at 410. Judge Friendly applied this two-step analysis in *United States v. Certain Property*, 344 F.2d 142 (2nd Cir. 1965):

> Next, says the Government, the question what the United States takes when it files a declaration of taking of real property is a question as to which federal courts *may* make an independent determination, free from any requirement . . . to follow state law. We fully agree. Where we break off from the Government is at its third proposition—that the interest in nation-wide uniformity of federal condemnation makes it imperative for federal courts to *use* this freedom to ignore state property law in determining what the United States takes when it takes "real estate". *Id.* at 144 (citations omitted).

substantive state or federal law presents a choice of law problem no different from any other: the choice "is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law". *Standard Oil, supra,* 332 U.S. at 309-10, 67 S.Ct. at 1609.[8]

III. CHOICE OF LAW INTEREST ANALYSIS IN THE INSTANT CASE

Because I view this case as presenting a traditional choice of law question, I think it is highly relevant that the federal eminent domain power here is exercised pursuant to Section 21 and that the United States is not a party to the action. These distinctions significantly color the "specific governmental interest" involved and dictate a choice of law other than that made by the majority.

I agree that the Federal Power Act delegates the full federal power of eminent domain to a licensee under Section 21, but I think the majority is off base in concluding that this full delegation renders irrelevant any distinction between the United States and licensees as parties to a condemnation. Our focus should be directed toward the *interests* of the parties, not toward the degree of delegation.

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8. *United States v. 93.970 Acres of Land,* 360 U.S. 328, 79 S.Ct. 1193, 3 L.Ed.2d 1275 (1959), supports this view. In that case, the Supreme Court refused to apply a state election of remedies law where the United States sought, in one action, to condemn land and adjudicate the rights of a third party claiming a possessory interest in the land. The state law would have been manifestly unfair to the Government, presenting it with "a Hobson's choice". As the Court noted, "[w]e have often held that *where essential interests of the Federal Government are concerned,* federal law rules unless Congress chooses to make state laws applicable. It is apparent that no such choice has been made here". *Id.* at 332-33, 79 S.Ct. at 1196. [citations omitted]. Thus, the Court did not automatically apply federal law. Rather, it looked to the classic choice of law factors: nature of the federal interest, hostility of the state law, and congressional intent.

The Act clearly expresses a legislative finding that the United States has a distinct interest, one greater than that of a licensee. Under Section 7(b) of the Act, 16 U.S.C. § 800(b), the Federal Power Commission may not issue a license where it has found that "the development of any water resources for public purposes should be undertaken by the United States itself". *See Udall v. F. P. C.*, 387 U.S. 428, 87 S.Ct. 1712, 19 L.Ed.2d 869 (1967). I thus find persuasive the reasoning of the Ninth Circuit in *Public Utility District No. 1 of Pend Oreille Co. v. City of Seattle*, 382 F.2d 666, 669-70 (9th Cir. 1967), cert. dismissed, 396 U.S. 803, 90 S.Ct. 22, 24 L.Ed.2d 59:[9]

> We first observe that the position of a licensee is distinguishable from that of the United States with respect to furthering the national interest. By issuance of a license the United States is not acting in the national interest through the licensee to the same extent as it would if it undertook the project itself. The United States acts in the public interest on a national scale; the licensee often on a local scale, on projects thought to be of insufficient dimensions to warrant the assertion of national power. In many cases the requirements of federal permission and regulation are all that the national interest requires. Frequently the licensee is a privately owned utility or even manufacturer, seeking the license for purposes of profit.

For these reasons, I conclude that a Section 21 condemnation does not involve the same degree of federal interest as a condemnation by the United States itself.[10]

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9. Although the Ninth Circuit offered this analysis in support of its finding that Section 21 does not delegate full eminent domain power, I cite it here because of its relevance to determining state and federal interests in this case.

10. The majority contends that simply because "the property will be used privately is not reason enough" to draw a distinction, noting that "[i]n *Miller*, for instance, the United States took land

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The majority concedes that "[e]ven if a sharp distinction between a licensee and the United States cannot be drawn, it may be that the federal interest in the price paid for licensed hydroelectric plants is less than in other government projects. If so, use of state law would be appropriate . . . .", majority opinion at 1188. After weighing the relative state and federal interests, the majority concludes that "[t]he balance tips toward the need for federal law", majority opinion, supra at 1189. Herein lies my second point of departure.

Georgia's interest in having its compensation law applied is manifest. This case involves only Georgia parties and Georgia land. The state's law of compensation is more favorable to the landowner than is the federal law. As a federal court we are not concerned with the wisdom of that policy; all that is relevant to our consideration is that Georgia has decided how best to serve the interests of citizens. Absent the fact that the state utility here is exercising a federal power pursuant to a federal statute, this would be a classic case of traditionally and exclusively local concern.

But the majority, in construing the Federal Power Act, finds a "significant conflict" with state law as required by *Wallis*: "federal common law of compensation is the appro-

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Footnote continued—

for use by a private railroad", majority opinion at 1186. Examination of the facts in *Miller*, however, reveals a significant federal interest in the taking there—an interest which by traditional choice of law standards amply justified the application of federal law. The United States condemned the land in question to allow relocation of private railroad tracks which otherwise would have run directly through an area soon to be flooded by the Central Valley Reclamation Project in California. In 1935, Congress authorized the appropriation of $12,000,000 for this project, construction of which was approved by President Roosevelt in December of that year. In the next two years, Congress appropriated another $19,400,000 for the project. 317 U.S. at 370-71, 63 S.Ct. at 278.

priate choice in this case because the use of state law could interfere with achievement of congressional aims", majority opinion, supra at 1190. The majority cites two aims of the statute. Neither, I submit, is threatened by the application of state law.

The majority notes in the first place that the "primary concern" of Congress in passing the Act "was to stimulate private development of America's hydroelectric power resources", majority opinion, supra at 1190. This goal is frustrated in jurisdictions where, as here, the state law of compensation produces a substantially higher award for the landowner. This assumption I view as much too conjectural to afford a basis for application of federal law. The majority admits that the increased cost of the project involved in this case might not substantially interfere with federal goals; it is only when "all the acquisitions for a major project are grouped together, and even more so when many licensed projects are considered as an aggregate", majority opinion, supra at 1190, that the "accompanying chill" on development becomes significant. We have been presented with no data as to such aggregate costs or, for that matter, whether the laws of other states present a similar conflict with federal law. It was precisely this type of rationale—to remove "obstacles to exploration for development"—which led this Court astray in *McKenna v. Wallis,* 344 F.2d at 441. In reversing the Fifth Circuit, the Supreme Court cautioned that while such a rationale might be "fitting . . . where a State interposes unreasonable conditions . . . it can have no force" where the state law "provides a quite feasible route" to accomplish the immediate goal—in that case, to assign a lease, here, to compute just compensation. 384 U.S. at 70, 86 S.Ct. at 1305.

Secondly, the majority finds a direct federal interest "in minimizing the cost of licensed facilities by applying

federal valuation rules", majority opinion, supra at 1190, because under Section 14 of the Act, the federal government has the option to acquire a project at the expiration of a license. 16 U.S.C. § 807. I cannot accept the majority's conclusion that "[u]se of federal compensation standards would reduce the option price and further this congressional desire to make government acquisition a realistic possibility", majority opinion, supra at 1191. Again, we lack the data to conclude that the additional cost imposed under Georgia law would make federal acquisition less than "a realistic possibility". Furthermore, the statute does not clearly mandate inclusion of that extra cost in the federal option price.[11] Of course, we have no way of knowing at this point if the United States ever will exercise its option at all. At best, then, the effect on the fiscal interests of the United States is highly speculative.[12] When this court

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11. In defining the option price, the statute provides that the United States "shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken . . ." 16 U.S.C. § 807. Thus, while the concept of "net investment" is affected in the abstract by a higher price paid for a project when state compensation law is applied at the time of licensee acquisition, the statute limits the concept to "the fair value of the property taken . . ." if and when the federal option is exercised. The question here is whether "fair value" is also to be computed on the basis of state law or whether a uniform federal standard should be applied. Arguably, a stronger case for the application of federal law can be made here because there is a direct federal interest: the federal government is paying out of its own funds to acquire the project. Whether this is the construction of Section 14 that will ultimately prevail I do not forecast. These problems of interpretation are raised only to stress that whether the price paid by a state party in a Section 21 condemnation will affect the price later paid by the federal government in exercising its option under Section 14 is by no means certain.

12. In *Grand River Dam Authority v. Grand-Hydro*, 335 U.S. 359, 69 S.Ct. 114, 93 L.Ed. 64 (1948), petitioner argued that because of the strong federal interest, the Oklahoma Supreme Court was required to apply federal law in an eminent domain action by a state agency to condemn land for a power site. The Court rejected this argument. Petitioner raised, inter alia, the

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evinced similar solicitude for the federal fisc in *Miree v. DeKalb County, Ga., supra*, the Supreme Court reversed because "the resolution of petitioners (sic) breach of contract claim against respondent will have no *direct* effect upon the United States or its Treasury". ..... U.S. at ....., 97 S.Ct. at 2494.

Finally, there is a single, telling argument which effectively refutes the majority's reading of congressional intent. In finding that "Congress did not believe it necessary to follow state eminent domain rules or desire courts to do so," majority opinion, supra at 1183, the majority overlooks the fact that Congress left up to the licensee whether to acquire land through a Section 21 action or a state condemnation. The majority admits: "If a licensee brought a *state* condemnation action in state court, state law would govern", majority opinion, supra at 1192. It is well established that "under this Act . . . the condemnor has an election to exercise the power of eminent domain either under the specified enumerations of the Federal Power Act or under" the law of the state. *Oakland Club v. South Carolina Public Service A.*, 110 F.2d 84, 86 (4th Cir. 1940), cited with approval in *Chapman v. Public Utility District No. 1*, 367 F.2d 163, 167 (9th Cir. 1963). This Circuit has recognized that the state eminent domain power is "separate and distinct" from that granted a licensee under a federal statute analogous to Section 21. *Robinson v. Transcontinental Gas Pipe Line Corp.*, 421 F.2d 1397, 1398 (5th Cir. 1970). Congress' commerce power is plenary. Presumably, if Congress could *forbid* the con-

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fact that the United States had an option to acquire the project after the license expired. The Court responded: "Such a recapture of the project is even more remote than a determination of a rate base . . . . We accordingly express no opinion upon the issues which may arise when, as and if the above-mentioned proceedings may be taken". *Id.* at 375, 69 S.Ct. at 122.

struction of hydroelectric facilities using navigable waters without a license granted by the FPC, 16 U.S.C. § 817,[13] it could have required application of federal law in *any* condemnation to secure land for purposes of building such facilities. That it did not do is significant.[14]

Rather, "[i]n the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act". *First Iowa Hydro-Elec. Coop. v. FPC,* 328 U.S. 152, 167, 66 S.Ct. 906, 913, 90 L.Ed. 1143 (1946). "The Act leaves to the states their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce". *Id.* at 171, 66 S.Ct. at 915. Congress was careful not to cast the regulation of hydroelectric plants in an

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13. "The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government. . . . [T]he plenary power of Congress over navigable waters would empower it to deny the privilege of constructing an obstruction in those waters. It may likewise grant the privilege on terms. It is no objection to the terms and to the exertion of the power that 'its exercise is attended by the same incidents which attend the exercise of the police power of the states.' The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment". *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 426-27, 61 S.Ct. 291, 308, 85 L.Ed. 243 (1940). This passage casts doubt on the majority's statement that "it is not certain that Congress had the power to compel such uniformity". Majority opinion, supra, at 1183 n. 16.

14. "As to the question whether the Federal Power Act should be interpreted as actually superseding the state law of condemnation and as restricting the measure of valuation which lawfully may be used by the courts of Oklahoma in a condemnation action for the acquisition of land for power site purposes by an agency of that State, there is nothing in the Federal Power Act to indicate that an attempt has been made by Congress to make such a nationwide change in state laws". *Grand River Dam Authority v. Grand-Hydro,* 335 U.S. 359, 374, 69 S.Ct. 114, 121, 93 L.Ed. 64 (1948).

entirely federal mold; it decided to leave many of the incidents of regulation to the states.[15] The legislative history shows no concern by Congress over whether licensees pay for condemned land according to state or federal rules of compensation. Congress had—but failed to exercise—the power to assure application of a uniform, *federal* standard in *any* exercise of eminent domain power, state or federal, to acquire land on which to build these federally regulated facilities. Against this background, I cannot concur in the majority's exotic interpretations of an intent that Congress surely never had.

IV. CONCLUSION

In sum, I do not dispute that there is a great national interest in promoting the development of domestic sources of energy. But it is for Congress, in the first instance, to say how this interest is to be achieved. Where the federal regulatory scheme comes in conflict with state law and thus with a state interest, we need some affirmative indication that Congress intended the federal common law to govern before we go about displacing state law. Such an indication might be inferred from the mere presence of a conflict significant in that it substantially impedes achievement of federal aims. Otherwise, we are to presume that Congress felt the national interest adequately served by application of state law.

I do not think it can fairly be said that Congress intended the result reached by the majority. Failing that, we are left to analyze the respective federal and state interests in determining which law to apply. Against

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15. "The resulting integration of the respective jurisdictions of the state and Federal Governments, is illustrated by the careful preservation of the separate interests of the states throughout the Act, without setting up a divided authority over any one subject". *First Iowa Hydro-Elec. Coop., supra,* 328 U.S. at 174, 66 S.Ct. at 916.

clear, substantial and immediate state interests we are met with only speculative, attenuated national concerns and offered no persuasive arguments as to why the Georgia law of compensation is unreasonable or inadequate to achieve the broad goals of the Federal Power Act. I conclude that "the application of federal common law to resolve the issue presented in this case would promote no federal interests even approaching the magnitude of those found in *Clearfield*". *Miree, supra,* ..... U.S. at ....., 97 S.Ct. at 2493. Thus, there is no "significant conflict". Georgia's law should be applied.

To put it simply: We had to make a choice of law, but I am convinced that the majority has made the wrong choice.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19.....

No. 77-1775

D.C. Docket No. CA-74-169-MAC

GEORGIA POWER COMPANY,
Plaintiff-Appellee,

versus

138.30 Acres of Land, situate, lying and being in Land Lot 327 of the 3rd Land District, 389th G.M. District, Putnam County, Georgia,
Defendants,

MILDRED B. SAUNDERS, a/k/a
Mrs. Karl D. Sanders, Jr., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Georgia

Before COLEMAN, Chief Judge, BROWN, AINSWORTH, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judge.*

*Judge Goldberg was a member of the en banc court under 28 U.S.C.A. §46(c) and participated in the oral argument of the case en banc. Since that time he has taken senior status and therefore does not participate in this decision. Judges Godbold and Anderson were recused and took no part in the consideration or decision of these cases. Judge Charles Clark took no part in the consideration or decision of these cases.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on defendants-appellants' petition for rehearing en banc without oral argument;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby vacated; and that this cause be, and the same is hereby re...anded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal in this Court.

May 27, 1980

FAY, Circuit Judge, concurring.

ALVIN B. RUBIN, Circuit Judge, with whom AINSWORTH, TJOFLAT and FRANK M. JOHNSON, JR., Circuit Judges, join, dissenting.

Issued as Mandate: June 18, 1980

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By: /s/ Mary Beth Breaux, Deputy
New Orleans, Louisiana June 18, 1980

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19.....

No. 77-1776

D.C. Docket No. CA-74-174-MAC

GEORGIA POWER COMPANY,
Plaintiff-Appellee,

versus

377.61 ACRES OF LAND, SITUTE, LYING AND BEING IN LAND LOTS 367, 368, 377, 378, 379, 380, 381, 382 and 383 OF THE THIRD LAND DISTRICT, 389th G.M. DISTRICT, OF PUTNAM COUNTY, GEORCIA,
Defendants,

MRS. NELLIE W. LARMAN, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Georgia

Before COLEMAN, Chief Judge, BROWN, AINSWORTH, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges.*

*Judge Goldberg was a member of the en banc court under 28 U.S.C.A. §46(c) and participated in the oral argument of the case en banc. Since that time he has taken senior status and therefore does not participate in this decision. Judges Godbold and Anderson were recused and took no part in the consideration or decision of these cases. Judge Charles Clark took no part in the consideration or decision of these cases.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on defendants-appellants' petition for rehearing en banc without oral argument;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby vacated; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal in this Court.

May 27, 1980

FAY, Circuit Judge, concurring.

ALVIN B. RUBIN, Circuit Judge, with whom AINSWORTH, TJOFLAT, and FRANK M. JOHNSON, JR., Circuit Judges, join, dissenting.

Issued as Mandate: June 18, 1980

A true copy

Test GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By: /s/ Mary Beth Breaux, Deputy
New Orleans, Louisiana 6-18-80

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19.....

No. 77-1777

D.C. Docket No. CA-75-26-ATH

GEORGIA POWER COMPANY,
Plaintiff-Appellee,

versus

532.82 Acres of Land, situate, lying and being in the 145th G.M. District of Greene County, Georgia,
Defendants,

CLIFFORD H. DYAR, JR., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Georgia

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Before COLEMAN, Chief Judge, BROWN, AINSWORTH, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges.*

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*Judge Goldberg was a member of the en banc court under 28 U.S.C.A. §46(c) and participated in the oral argument of the case en banc. Since that time he has taken senior status and therefore does not participate in this decision. Judges Godbold and Anderson were recused and took no part in the consideration or decision of these cases. Judge Charles Clark took no part in the consideration or decision of these cases.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on defendants-appellants' petition for rehearing en banc without oral argument;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and the same is hereby vacated; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal in this Court.

May 27, 1980

FAY, Circuit Judge, concurring.

ALVIN B. RUBIN, Circuit Judges, with whom AINSWORTH, TJOFLAT and FRANK M. JOHNSON, JR., Circuit Judges, join, dissenting.

Issued as Mandate: June 19, 1980.

A true copy

Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit.

By: /s/ Mary Beth Breaux, Deputy
New Orleans, Louisiana June 18, 1980

SURVEY OF STATUTES AUTHORIZING USE OF FEDERAL EMINENT DOMAIN POWER

10 U.S.C.A. §2663 (1975) - Secretary of any military department - land needed for camps, chemical plants, etc.

10 U.S.C.A. §2664 (1975) - Secretary of a military department, Secretary of Commerce or Chairman of Federal Maritime Board - Sawmills, camps, roads, right-of-way needed for production of aircraft, vessels, housing for troops, etc.

15 U.S.C.A. §717f (1976 and West Supp. 1980) - Holder of Federal Power Commission certificate - right-of-way for natural gas pipelines and related apparatus.

16 U.S.C.A. §516 (West Supp. 1980) - Secretary of Agriculture - forest reservation.

16 U.S.C.A. §577e (1974) - Secretary of Agriculture - lands to make Superior National Forest.

16 U.S.C.A. §590a (1974) - Secretary of Agriculture - lands necessary to control soil erosion.

16 U.S.C.A. §807 (1974) - U.S. - licensed water projects under private control.

16 U.S.C.A. §814 (1974) - Licensee operating water project - lands necessary for dams, reservoirs, etc.

16 U.S.C.A. §831x (1974) - Tennessee Valley Authority - land, easements, right-of-ways necessary.

16 U.S.C.A. §832a (1974) - Administrator of Bonneville Project - any property rights necessary for Bonneville Project.

16 U.S.C.A. §833a (1974) - Secretary of Interior - any property rights necessary for Fort Peck Project.

20 U.S.C.A. §3477 (West Supp. 1980) - Secretary of Education - schools, laboratories, testing sites, etc.

22 U.S.C.A. §277c (1979) - President - real property necessary for fences, flood control, etc. on border with Mexico.

22 U.S.C.A. §277d-1 (1979) - Secretary of State - land needed for relocation of roads, etc.

22 U.S.C.A. §277d-34 (1979) - Secretary of State - land necessary to give the Mexicans after agreeing on a boundary, to keep the boundaries as they are, etc.

23 U.S.C.A. §107 (1966) - Secretary of Commerce - lands necessary for interstate system of highways.

24 U.S.C.A. §271 (1966) - Secretary of Army - lands necessary for national cemetery.

25 U.S.C.A. §500a (West Supp. 1980) - Secretary of Interior - real property necessary to provide Eskimos with a reindeer industry.

30 U.S.C.A. §1237 (West Supp. 1980) - Secretary of Interior - real property affected by past coal mining practices, for reclamation purposes.

33 U.S.C.A. §591 (1970) - Secretary of Army - land or right-of-way needed for improvement of rivers and harbors.

33 U.S.C.A. §984 (1978) - St. Lawrence Seaway Development Corporation - real property necessary for maintenance, etc. of seaway.

38 U.S.C.A. §1006 (1979) - Administrator of Veteran's Administration - additional land for national cemetery.

38 U.S.C.A. §5022 (West Supp. 1980) - Administrator of Veteran's Administration - necessary space for administrative purposes.

39 U.S.C.A. §401 (West Supp. 1980) - Postal Service - eminent domain in furtherance of its official purposes.

40 U.S.C.A. §72 (1969) - National Capital Planning Commission - land in Washington, D.C., Virginia and Maryland for National Capital Park, parkway and playground system.

40 U.S.C.A. §257 (1969) - Any office of government - real estate for erection of public building.

40 U.S.C.A. §490 (1969 and West Supp. 1980) - Administrator of General Services Administration - land for buildings and projects authorized by Congress.

40 U.S.C.A. §875 (West Supp. 1980) - Pennsylvania Avenue Development Corporation - land necessary to carry out development plan.

42 U.S.C.A. §1592d (1978) - Secretary of HUD - land for housing and community facilities.

42 U.S.C.A. §1594a (1978) - Secretary of Defense - land or housing for military personnel.

42 U.S.C.A. §2063 (1973) - Atomic Energy Commission - facilities for production of nuclear materials.

42 U.S.C.A. §2473 (1973 and West Supp. 1980) - NASA - laboratories, testing sites, accommodations for employees, etc.

42 U.S.C.A. §6239 (1977 and West Supp. 1980) - Administrator of Federal Energy Administration - land for petroleum storage and other facilities.

43 U.S.C.A. §36b (1964) - Secretary of Interior - land easements, right-of-ways, for use in gaging streams and underground water resources.

43 U.S.C.A. §421 (1964) - Secretary of Interior - land for irrigation projects.

43 U.S.C.A. §617 (1964) - Secretary of Interior - land incidental to constructing Boulder Canyon Dam.

43 U.S.C.A. §942-3 (West Supp. 1980) - Companies granted right-of-ways through Alaska by other code sections - right-of-ways over privately held lands.

45 U.S.C.A. §545 (West Supp. 1980) - National Railroad Passenger Corporation - property needed for intercity mail passenger service.

50 U.S.C.A. §100a (West Supp. 1980) - President - lands, right-of-ways and materials needed in nitrate plants.